Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LOREN J. ZUTZ; ELDEN J. ELSETH, PETITIONERS

v.

JOHN NELSON; ARLYN STROBLE; NICK DREES; DOUGLAS KAMROWSKI; ROUGHRIDER LEGAL SUPPORT SERVICES, INC.; DANNY OMDAHL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL A. SORTLAND
Counsel of Record

Sortland Law Office
120 South Sixth Street
Suite 1510
Minneapolis, MN 55402
sortland@sortland.com
(612) 375-0400

CURRY & TAYLOR ♦ 202-393-4141

QUESTIONS PRESENTED

I. What extent of allegations are necessary to maintain a successful First Amendment retaliation claim to show that there was sufficient adverse action "that would chill a person of ordinary firmness from engaging in that activity," c.f. *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007).

II. Is *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976), properly read to bar a Section 1983 action for damage to reputation?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 601 F.3d 842 (8th Cir. 2010). App 1a. The decision of the United States District Court for the District of Minnesota, granting summary judgment, January 23, 2009, App. 1a is not reported. The district court affirmed the Magistrate Judge's denial of Plaintiffs' motion to amend its pleadings on January 14, 2009. The United States Magistrate Judge denied Plaintiffs' motion to amend their Complaint on December 1, 2008. App. 22a. The Court of Appeals denied the Petition for Rehearing *en banc* and Petition for Rehearing by the Panel on May 27, 2010, App. 56a.

JURISDICTION

Plaintiffs brought this matter in the District Court for the District of Minnesota based upon a federal question, pursuant to 28 U.S.C. 1331, in that this is a civil suit arising under the Constitution and the laws of the United States, brought pursuant to 42 U.S.C. 1983. Jurisdiction was further invoked pursuant to 28 U.S.C. 1343 (a) in that this action sought to redress deprivation, under color of state law, of rights secured to the Plaintiffs by the First, Eighth, and Fourteenth Amendments to the Constitution of the United States and the laws of the United States. The

decision of the United States Court of Appeals for the Eighth Circuit, affirming the dismissal of the Complaint and the denial of the motion for leave to amend was decided on April 15, 2010. A timely Petition for Hearing *en banc* and Petition for Rehearing by the Panel was denied on May 27, 2010. This Court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

RELEVANT PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution, Section. 1. (In part).

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

42 U.S.C. 1983 Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

STATEMENT

The Petitioners brought this lawsuit under 42 U.S.C. 1983, against the Defendants, alleging that the

Defendants had acted, jointly and separately, to deprive them of their Constitutional rights in retaliation for their investigation of improprieties of the Middle Snake Tamarac Rivers Watershed District.

The Petitioners, Loren J. Zutz and Elden J. Elseth, were board members, called managers, of the Middle Snake Tamarac Rivers Watershed District located in Northwestern Minnesota. The Petitioners filed this action alleging the Defendants, including two other board members, an administrator and employee of the Watershed District, and a private investigator from North Dakota sought to defame them, impeach their credibility, and cause them financial harm because of the investigation of the Plaintiffs which was disclosing financial improprieties by the Watershed District.

Appellants sought to amend their Complaint to show specific harm caused by the defamatory and other wrongful conduct of the Defendants. This additional harm included the refusal of the Watershed District to lease property to Zutz, as it had done previously, causing substantial loss of income, a censorship of Elden Elseth, for his activities, as well as other actions. The motion to amend was denied by the Magistrate Judge on December 1, 2008. App. 22a. The district court affirmed the Magistrate Judge's Order on January 14, 2009. On January 23, 2009, the district court granted Defendants' motion to dismiss, contending there was a failure to state a federal claim upon which relief could be granted. App. 18a.

A timely appeal was made on February 19, 2009. The Eighth Circuit Court of Appeals affirmed the

decision of the district court and held that both the initial Complaint and the proposed Amended Complaint failed to state a federal cause of action. *Zutz v. Nelson*, 601 F.2d 842, 852 (8th Cir. 2010). App. 1a.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari asks this Court to help clarify the amount of harm that must be plausibly pleaded to sustain claim for asserting a First Amendment Retaliation Claim that "would chill a person of ordinary firmness from engaging in that activity." *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007).

Alternatively, this Petition asks the Court to reconsider and clarify whether the Court of Appeals and district court are correct that *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976), is properly read to bar a cause of action for damage to reputation alone.

Assuming that the Court of Appeals is correct, that damage to reputation alone is not sufficient to invoke the procedural protections of the due process clause, *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976), the Petitioners submit that the evidence in this case shows that loss of reputation was coupled with some other tangible element which rises to the level of a protectable property interest.

In the original Complaint, the Appellants alleged that the actions of the Defendants caused damage to reputation, mental distress, humiliation and embarrassment as a result of the wrongful conduct of

Defendants. 601 F.3d at 849. In the proposed Amended Complaint, the Petitioners added several factual allegations in an attempt to establish Constitutional deprivation including the Watershed District board's decision not to rent property to Zutz, the board's decision to censure, the board's decision to revoke the Appellants' check signing authority, and the board's refusal to appoint the Petitioners to sub-committees. 609 F.3d at 851.

The Eighth Circuit Court of Appeals has noted that, "in some cases, embarrassment, humiliation and emotional distress may be sufficient to support a Section 1983 claim." *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002). It held, however, in this case, that while the statements of the Defendants may have damaged the reputation of the Petitioners, it also held that such reputational damage was insufficient to chill a person of ordinary firmness from engaging in the protected activity. *Id.* at 849. App. 9a.

With respect to the additional allegations in the proposed Amended Complaint, the Eighth Circuit doubted whether the additional factual allegations could state Constitutional deprivations sufficient to chill a person of ordinary firmness or were sufficient to meet the "plus" portion of the "stigma plus" test. *Id.* at 851. It held, moreover, even if it assumed that the facts did allege a Constitutional deprivation, that Section 1983 demanded more than a simple claim that the Appellees engaged in wrongful conduct and that the Appellants were deprived of their Constitutional rights, holding that the Complaint did not satisfy causation, even though the Complaint held that these actions occurred as a result of Defendants' activities.

Id.

Petitioners respectfully submit that they did plausibly plead that they engaged in protected activity and that the Defendants, to retaliate for this protected activity, took adverse action against them that would chill a person of ordinary firmness from engaging in that activity. See, *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007).

In this case, the Eighth Circuit panel concluded that the Appellants have plausibly pled that they were engaged in protected activity and that the Appellees' defamatory comments were made with an intent to retaliate for the protected activity. However, the Eighth Circuit concluded that the Plaintiffs have not "plausibly pleaded the defamatory conduct would chill a person of ordinary firmness, . . ." 601 F.3d at 849. App. 9a.

The Court noted that the Plaintiffs claimed damages to their reputation, mental distress, humiliation and embarrassment as a result of the defamatory conduct. The Court noted that, "in some cases, embarrassment, humiliation and emotional distress may be sufficient to support a Section 1983 claim." *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002). The Court went on, to state, however, since "criticism of public officials lies at the very core of speech protected by the First Amendment," . . . "it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." The Court concluded that while the statements made by the

Defendants may have damaged the reputation of Zutz and Elseth, such reputational damage was insufficient to chill a person of ordinary firmness from engaging in the protected activity. The Court, therefore, affirmed the district court's dismissal of the retaliation claim. *Id.*

The Court further denied a proposed Amended Complaint to add allegations in an attempt to establish Constitutional deprivation, including allegations of actions that resulted from the Defendants' activities, the Watershed District would not rent property to Zutz, that Elseth was censured by the Watershed District Board, and that the board revoked the Appellants' check signing authority and the board's refusal to appoint either Zutz or Elseth to sub-committees of the board. Petitioners submit that the serious economic harm would, indeed, "chill a person of ordinary firmness from engaging in such First Amendment rights."

The Eighth Circuit stated it had doubts as to whether these added factual allegations state a Constitutional deprivation sufficient to chill a person of ordinary firmness or were sufficient to meet the "plus" portion of the "stigma plus" test, but, even assuming that facts do allege a Constitutional deprivation, that Section 1983 demanded more than a simple claim that Appellees engaged in wrongful conduct and that the Appellants were deprived of Constitutional rights. The Court stated that in order to pursue a cause of action under Section 1983, a plaintiff must plead facts that would tend to establish that the defendant's wrongful conduct *caused* the Constitutional deprivation. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The panel concluded that the Complaint was "wholly devoid" of

any factual allegation linking the bad behavior of the Appellees to the alleged Constitutional deprivations.

The reason the Court concluded this is that the Appellees themselves did not have the power to personal deprive the Appellants of the asserted rights, but only the board as a whole, and thus the allegations amounted to nothing more than "mere conclusory statements." 601 F.2d at 851.

The Eighth Circuit held that a simple "chronological analysis" of the facts did not equate to causation and therefore the matter should be dismissed and that the proposed Amended Complaint would not be allowed. *Id* at 852. Petitioners submit that this chronological analysis is, indeed, a sufficient showing of causation in order to avoid a motion to dismiss. Taking all inferences in favor of the non-moving parties, the Court should have allowed the case to proceed forward. Clearly, the actions of the Defendants caused the resulting harm to occur.

The second question raised by the Plaintiffs concerns the construction and continued effect of *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976), insofar as it is read to bar a cause of action for damage to reputation alone. Petitioners respectfully submit that this decision may be misconstrued, or, indeed, after the passage of time, may be reconsidered so as to allow a civil rights action under Section 1983 to pursue, even if the only damages shown to result from the deprivation of civil rights is damage to reputation. In *Paul v. Davis*, the Court considered whether defamation, standing alone and apart from any other governmental action, stated or claimed for relief under

42 U.S.C. 1983.

In *Paul v. Davis*, the Court held that to be cognizable under Section 1983, the plaintiff must allege both a deprivation of a Constitutional right and the effectuation of that deprivation under color of law. *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). The dissent pointed out that the implication, however, that the existence of a *vel non* of a state remedy - for example, a cause of action for defamation - is irrelevant to the determination whether there is a cause of action under Section 1983 is wholly unfounded. "It is no answer that the State has a law which if enforced would give relief. The Federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the Federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

In this case, of course, the Court noted that the state courts upheld that the Defendants, indeed, are immune and therefore the Plaintiffs have no claim against the Respondents for the alleged violations under state law. See, *Zutz v. Nelson*, (unpublished, Minn. App. June 23, 2009) (review granted, September 16, 2009).

One's reputation has always been held as important by this Court.

"Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 501, 27 L. Ed.2d 515 (1971); *Wieman v. Updegraff*, 344 U.S.

183, 191, 73 S. Ct. 215, 97 L. Ed. 216 (1952).

In *Jenkins v. McKeithen*, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed.2d 404 (1969), this Court held that the public branding of an individual implicates interests cognizable as either "liberty" or "property," and that such public condemnation cannot be accomplished without procedural safeguards designed to eliminate arbitrary or capricious executive action. 395 U.S. at 424.

Consequently, it is clear that the broad history of jurisprudence in the United States, as exemplified in *Jenkins* and *Constantineau* have always held that a person's interest in his good name and reputation falls within the broad term "liberty" and clearly requires that the government afford procedural protections before infringing that name and reputation by branding a person as a criminal, or otherwise defaming that person.

The precedence of this Court clearly mandate that a person's interest in his good name and reputation is cognizable as a "liberty" interest within the meaning of the Due Process Clause. To the extent that the recent decisions of this Court, or the Eighth Circuit Court of Appeals imply this is not the case, such erosions of the doctrine are ripe for review.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

PAUL A. SORTLAND

SORTLAND LAW OFFICE

120 South Sixth Street, Suite 1510
Minneapolis, Minnesota 55402-1817
(612) 375-0400
(612) 375-0404 (Facsimile)

ATTORNEY FOR PETITIONERS

No. 09-1462

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Loren J. Zutz; Elden J. Elseth,
Appellants,
v.
John Nelson; Arlyn Stroble; Nick Drees; Douglas Kamrowski; RoughRider Legal Support Services, Inc.; Danny Omdahl,
Appellees.

December 15, 2009, Submitted

April 15, 2010, Filed

COUNSEL: For Loren J. Zutz, Elden J. Elseth, Plaintiff - Appellants: Paul Allan Sortland, SORTLAND LAW OFFICE, Minneapolis, MN.

For John Nelson, Arlyn Stroble, Defendant - Appellees: Lindsay Grier Arthur, Jr., ARTHUR & CHAPMAN, Minneapolis, MN.

For Nick Drees, Danny Omdahl, Defendant - Appellees: Mark A. Solheim, Paula Duggan Vraa, John M. Bjorkman, LARSON & KING, St. Paul, MN.

For Douglas Kamrowski, RoughRider Legal Support Services, Inc., Defendant - Appellees: Victor Lund, Richard Patrick Mahoney, MAHONEY & DOUGHERTY, Minneapolis, MN.

Before BYE, BEAM, and COLLOTON, Circuit Judges.

OPINION

BEAM, Circuit Judge.

Loren Zutz and Elden Elseth, members of the Middle-Snake-Tamarac Rivers Watershed District Board (Board), filed this action alleging state law defamation and violations of 42 U.S.C. § 1983 against the six appellees whom we divide into three different groups: (1) co-Board members John Nelson and Arlyn Stroble; (2) an administrator and an employee of the Board Nick Drees and Danny Omdahl and (3) the investigative consulting firm RoughRider Legal Support Services, Inc. (RoughRider) and its employee Douglas Kamrowski. The complaint also sought a declaration that Zutz and Elseth had not violated Minnesota law.

Appellees filed various motions to dismiss the complaint. Thereafter, Zutz and Elseth moved for leave to amend the complaint. The magistrate judge[1] issued an order denying the motion for leave to amend and the district court[2] affirmed. Subsequently, the district court granted the appellees' various motions and dismissed the original complaint for its failure to state a federal claim upon which relief could be granted. Zutz and Elseth now bring this appeal challenging both the dismissal of their complaint and the denial of their motion to amend. Since both the initial complaint and the proposed amended complaint fail to state a federal cause of action, we affirm.

I. BACKGROUND

Because this appeal arises from the grant of a motion to dismiss, we draw the relevant facts from the complaint.

See *In re 2007 Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 880 (8th Cir. 2009).

A. Defamatory Conduct

Sometime after being appointed to the Board, Zutz and Elseth suspected that the Board was involved in various financial improprieties. Accordingly, they launched an independent investigation, during which they gained access to the Board's bank and payroll records. These records confirmed their suspicions.

On June 18, 2007, at a formal meeting of the Board, co-Board members Nelson and Stroble complained about the appellants' investigation. Specifically, Nelson and Stroble made statements falsely claiming that the appellants had violated Minnesota law. In an effort to find support for their false accusations, the appellees requested that the Marshall County Commission investigate the matter. County Attorney Michael Williams followed up on this request and hired RoughRider, a North Dakota investigating firm.

RoughRider's employee, Kamrowski, conducted an investigation and filed a formal report with Williams. The report contained a number of false allegations against the appellants including conclusions that appellants had engaged in improper acts. Despite the allegations in the report, Williams concluded that appellants had not committed any malfeasance.

Although Williams declined to adopt the report's conclusions, appellee Drees sent the report to a wide number of people in Marshall County, thereby falsely representing the report as the final conclusion as to the

legality of the appellants' financial investigation. Drees also sent a letter to certain people falsely alleging, among other things, that the Board had lost its insurance as a result of appellants' conduct.

Meanwhile, appellee Omdahl joined in making false and disparaging comments about the appellants by sending a letter to the editor of a newspaper in Thief River Falls, Minnesota. The letter falsely contended that appellants had engaged in various illegal and improper acts. Notably, the letter was never published. But, in an effort to obtain an audience for the false statements, Omdahl and Drees brought their letters to the attention of the Marshall County Board of Commissioners.

B. Procedural Posture

Appellants first challenged the conduct of Nelson and Stroble in Minnesota state court on a theory of defamation. That matter was resolved when the trial court dismissed the action with prejudice after finding that the defendants were entitled to immunity. Subsequently, the appellants filed the original complaint in this action against all six of the appellees alleging § 1983 violations and state law defamation claims. Specifically, the original complaint claimed deprivation of their Fourteenth Amendment rights and alluded to violations of their First Amendment rights.

Additionally, the initial complaint contained a separate claim alleging that the appellees conspired to violate the appellants' constitutional rights. The appellees filed various motions requesting that the court dismiss the complaint. In response, appellants moved for leave to

amend the complaint. In their proposed amended complaint, the appellants maintained their original allegations and added new accusations that they were denied certain rights including not being appointed to subcommittees of the Board and not being permitted to be signatories on the Board's checking account. Additionally, the proposed complaint asserted that Zutz had lost the right to rent property from the Board and that Elseth had been improperly censured by the Board.

The magistrate judge denied the motion for leave to amend, finding that the proposed amendments would be "futile." Specifically, the magistrate judge found that the allegations against Nelson and Stroble were barred by res judicata, and that the proposed amended complaint failed to allege that the appellees caused the appellants' deprivation of constitutional rights. Accordingly, the magistrate judge held that the amended complaint was devoid of any federal cause of action. The appellants objected to that order, but the district court affirmed. Subsequently, the district court dismissed the original federal complaint for failure to state a claim upon which relief could be granted.

II. DISCUSSION

A. Res Judicata

As noted earlier, appellants first filed an action in Minnesota state court against Nelson and Stroble for defamation arising out of the statements at the June Board meeting. The state court dismissed the action after it held that Nelson and Stroble had immunity. The magistrate judge concluded that both the state action

and this action against Nelson and Stroble arose out of a common nucleus of operative fact. Thus, res judicata precluded the appellants from pursuing those claims in this subsequent action.

"We review a district court's dismissal decision on grounds of res judicata de novo." *Banks v. Int'l Union Elec., Elec., Technical, Salaried and Machine Workers*, 390 F.3d 1049, 1052 (8th Cir. 2004). In examining whether a final decision in a state-court judgment precludes a subsequent federal court action, we "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Under Minnesota law, res judicata

> applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter.

Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004). And "[r]es judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action." Id.

The appellants do not contest that the earlier claim involved Nelson and Stroble, that there was a final judgment or that they had a full and fair opportunity to litigate the matter. However, they do contend that the

state-court claim did not involve the same set of circumstances as those alleged in the current action. Specifically, they assert that the facts in the state-court action were based on the initial defamatory statements of Nelson and Stroble, while the federal action is comprised mostly of conspiratorial acts and resulting damages that occurred after the initial defamation. Under Minnesota law, "if the right to assert the second claim did not arise at the same time as the right to assert the first claim, then the claims cannot be considered the same cause of action." *Care Inst., Inc.-Roseville v. County of Ramsey*, 612 N.W.2d 443, 447 (Minn. 2000).

Contrary to appellants' view of their federal complaint, the only allegations in the pleading directly implicating Nelson or Stroble stem from their actions at the June Board meeting. Thus, it is certain that appellants anchor their case against Nelson and Stroble on the same defamatory statements that formed the basis of the state-court action. Accordingly, with regard to the alleged defamatory statements of Nelson and Stroble at the June Board meeting, this action involves the same set of facts as the earlier state-court claim. Since the appellants could have raised the same claims in their earlier state court action, their attempt to assert this action against Nelson and Stroble based on those June comments is precluded.[3]

B. Dismissal of the Original Complaint

1. Standard of Review

We review "*de novo* the grant of a motion to dismiss, taking all facts alleged in the complaint as true." *Owen*

v. Gen. Motors Corp., 533 F.3d 913, 918 (8th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Thus, "although a complaint need not include detailed factual allegations, 'a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *C.N. v. Willmar Pub. Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 629-30 (8th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555).

The appellants contend that the original complaint states a claim for relief under § 1983. Pursuant to our precedent, to state a claim for relief under § 1983, a plaintiff must allege sufficient facts to show "(1) that the defendant(s) acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right." *Schmidt v. City of Bella Villa*, 557 F.3d 564, 571 (8th Cir. 2009). For purposes of our discussion we assume (without deciding) that the appellants sufficiently alleged that the appellees were acting under color of state law. Thus, the remaining issue is whether the complaint adequately alleged that the appellees deprived the appellants of a constitutionally protected federal right. Appellants aver that the initial complaint asserts deprivation of their First, Fifth and Fourteenth Amendment rights. We disagree.

2. First Amendment Retaliation

To successfully plead a First Amendment retaliation claim, a plaintiff must plausibly plead that he/she "engaged in protected activity and that defendants, to retaliate for the protected activity, took adverse action against [them] that would chill a person of ordinary firmness from engaging in that activity." *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007). The appellants have plausibly pled that they were engaged in protected activity and that the appellees' defamatory comments were made with an intent to retaliate for the protected activity. But, because they have not plausibly pleaded that the defamatory conduct would chill a person of ordinary firmness, the First Amendment retaliation claim was properly dismissed.

The only retaliatory harms appellants allege in the original complaint are damage to their reputation, mental distress, humiliation and embarrassment as a result of the appellees' defamatory conduct. We have noted that "[i]n some cases, embarrassment, humiliation and emotional distress may be sufficient to support a § 1983 claim." *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002). However, since "'[c]riticism of public officials lies at the very core of speech protected by the First Amendment,'" *id.* at 927 (quoting *Colson v. Grohman*, 174 F.3d 498, 507 (5th Cir. 1999)), "it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." *Id.* at 928 (quotation omitted). All that the original complaint alleges is that the appellees made defamatory statements regarding the appellants' exercise of their official duties as public officials. While these statements may have damaged the reputation of Zutz and Elseth,

we believe that such reputational damage was insufficient to chill a person of ordinary firmness from engaging in the protected activity. We, therefore, affirm the district court's dismissal of the retaliation claim.

3. Fourteenth Amendment Due Process

The original complaint also includes a count asserting that appellees violated the appellants' Fourteenth Amendment due process[4] rights. Appellants assert that they adequately pleaded violations of both their procedural and substantive due process rights. Again, we disagree.

a. Procedural Due Process

Appellants claim that their reputations were damaged by the defamatory conduct of the appellees in violation of appellants' procedural due process rights. "Damage to reputation alone, however, is not sufficient to invoke the procedural protections of the due process clause." *Gunderson v. Hvass*, 339 F.3d 639, 644 (8th Cir. 2003) (citing *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). Instead, "[t]he loss of reputation must be coupled with some other tangible element to rise to the level of a protectible property interest." *Id.* We refer to this as the "stigma plus" test. Id. The appellants have clearly alleged defamatory damage to their reputation, but they have not alleged any other tangible harm. Since damage to reputation is not alone sufficient to invoke procedural due process, the district court correctly dismissed the procedural due process claim.

b. Substantive Due Process

To survive summary judgment on their substantive due process argument, appellants "must [have] allege[d] actions by a government official which 'violated one or more fundamental constitutional rights' and were 'shocking to the contemporary conscience.'" *C.N.*, 591 F.3d at 634 (quoting *Flowers v. City of Minneapolis*, 478 F.3d 869, 873 (8th Cir. 2007)). Again, all that the appellants have alleged are assertions of defamatory conduct to which they attach the label of extreme conduct violating the appellants' fundamental rights. Since there is no fundamental right to one's own reputation, *Paul*, 424 U.S. at 701, and since appellants have not even vaguely pled any other harm, the district court was correct in dismissing the substantive due process count of the original complaint. See *C.N.* 591 F.3d at 634-35 (noting that the complaint's "vague allegations neither provide the Appellees with fair notice of the nature of [appellant's] claims and the grounds upon which those claims rest nor plausibly establish [appellant's] entitlement to any relief").

4. Conspiracy

The complaint also states that the appellees conspired to deprive the appellants of civil rights. To plead a § 1983 conspiracy claim a plaintiff must plead that he suffered "a deprivation of a constitutional right or privilege." *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999). As noted above, the appellants have failed to allege such a deprivation. Thus, their original complaint falls short of stating a cause of action. Accordingly, the district court properly dismissed the conspiracy count.

5. State Law and Declaratory Judgment Claims

Upon dismissing the federal claims with prejudice, the district court concluded that it would not exercise jurisdiction over either the state law or declaratory relief claims. We affirm this decision because a district court may decline to exercise supplemental jurisdiction when it "has dismissed all claims over which it has original jurisdiction," 28 U.S.C. § 1367(c)(3), and because "the Declaratory Judgment Act . . . does not provide an independent basis for federal jurisdiction." *Victor Foods, Inc. v. Crossroads Econ. Dev.*, 977 F.2d 1224, 1227 (8th Cir. 1992) (citation omitted).

In sum, the initial complaint fails to plausibly allege the deprivation of a constitutional right, a necessary element of any § 1983 claim, and the district court was therefore correct in dismissing the federal claims with prejudice. As a result, the district court had discretion to dismiss the state law and declaratory relief counts without prejudice.

C. Denial of Leave to Amend

As also earlier noted, the appellants moved to amend their complaint in an attempt to avoid dismissal. The magistrate judge denied the motion, finding that any amendments would be futile. The district court affirmed. "We ordinarily review the denial of leave to amend a complaint for abuse of discretion, but when the district court denies leave on the basis of futility we review the underlying legal conclusions de novo." *2007 Novastar*, 579 F.3d at 884 (quotation omitted).

Denial of a motion for leave to amend on the basis of futility "means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Cornelia I. Crowell GST Trust v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir. 2008). Accordingly, in reviewing a denial of leave to amend we ask whether the proposed amended complaint states a cause of action under the Twombly pleading standard outlined above.

In their proposed amended complaint, appellants added several factual allegations in an attempt to establish a constitutional deprivation. These factual allegations include the Board's decision not to rent property to Zutz, the Board's decision to censure Elseth, the Board's decision to revoke the appellants' check signing authority and the Board's refusal to appoint either Zutz or Elseth to subcommittees of the Board.

We have doubts as to whether these added factual allegations state constitutional deprivations sufficient to chill a person of ordinary firmness or are sufficient to meet the "plus" portion of the "stigma plus" test. But, even if we assume that these facts do allege a constitutional deprivation, § 1983 demands more than a simple claim that the appellees engaged in wrongful conduct and the appellants were deprived of constitutional rights. Indeed, to state a cause of action under § 1983, a plaintiff must plead facts that would tend to establish that the defendant's wrongful conducted *caused* the constitutional deprivation. See *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986) ("If it appears from the complaint, . . . that there is no causal connection between the alleged deprivations and the

challenged conduct, the complaint may properly be dismissed for failure to state a claim."). Here, even if the amended complaint alleges wrongful conduct on the part of the appellees and a constitutional deprivation, the complaint is wholly devoid of any factual allegations linking the bad behavior of the appellees to the alleged constitutional deprivations.

Notably, several paragraphs of the proposed amended complaint state that the appellees were directly responsible for the constitutional deprivations. However, the appellees did not have the power to personally deprive the appellants of any of the asserted rights. Instead, only the Board as a whole, or at least a majority of the Board, could direct such harm.[5] As such, these allegations amount to nothing more than "mere conclusory statements," which do not suffice to state a plausible cause of action. *Iqbal*, 129 S. Ct. at 1949.

At oral argument, counsel for the appellants contended that the pleadings imply that the defamatory conduct caused the Board to take away the appellants' rights. As support for this "implication," counsel encouraged us to engage in a "chronological analysis" of the facts. Contrary to counsel's contention, however, chronology does not equate to causation. Simply because one event came first does not mean that the former *caused* the latter. Additionally, although we are permitted to draw inferences from the facts pleaded, see *Twombly*, 550 U.S. at 556, the only reasonable inference we can draw from the proposed amended complaint is that the defamatory conduct damaged the appellants' reputation. As we discussed above, such reputational damage is not alone sufficient to state a constitutional deprivation. *Gunderson*, 339 F.3d at 644. Moreover,

without more, it would be unreasonable for us to infer that the appellees' defamatory conduct caused the Board to strip the appellants' of constitutional rights.

Finally, counsel also contended that the "intent" of the pleadings was to allege that the appellees' conduct caused the Board to strip the appellants' constitutional rights. While counsel may have intended to state a cause of action, Twombly does not require us to divine what is in the mind of the plaintiff. Instead, we must look to the pleadings and discern whether the complaint states enough facts that plausibly leads to a cause of action. *Twombly*, 550 U.S. at 557. That is, that the defamatory action of these appellees caused a third party to act in a way that deprived the appellants of their constitutional rights. Without alleging any facts to suggest such a causal nexus, the proposed complaint only alleges separate actions by independent parties which fail to state a federal cause of action against these appellees. Accordingly, the proposed amended complaint would not survive a 12(b)(6) motion to dismiss and is, therefore, futile.

III. CONCLUSION

The original complaint fails to plausibly allege a constitutional deprivation. The proposed amended complaint, to the extent it states a constitutional deprivation, fails to plausibly allege a causal connection between the appellees' conduct and any constitutional deprivation. Accordingly, the district court's dismissal of the complaint and the denial of the motion for leave to amend are affirmed.

Footnotes

1The Honorable Raymond L. Erickson, Chief Magistrate Judge for the District of Minnesota.

2The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

3To the extent that the complaint alleges that Nelson and Stroble engaged in conspiratorial acts which arose after the state proceeding was decided, we assume that those claims are not precluded, and we address those allegations below.

4Appellants also contend that they have asserted a Fifth Amendment due process violation. However, since "[t]he Fifth Amendment's Due Process Clause applies only to the federal government or federal actions, and the [appellants] have not alleged that the federal government or federal action deprived them of property," their Fifth Amendment due process claim must fail. *Barnes v. City of Omaha*, 574 F.3d 1003, 1005 n.2 (8th Cir. 2009).

5Appellants rely on the doctrine of joint and several liability to argue that the law does not require that they sue all responsible parties in order to recover from one responsible party. This argument misses the point. The problem with the pleading is not that they did not sue enough of the parties who caused the damage. Instead, the problem is that the appellants have not plausibly alleged that the defamatory conduct of the appellees *caused* the deprivation of constitutional rights. Instead, the proposed amended complaint states that the appellees took wrongful action and that a third party, namely the Board, deprived the appellants of constitutional rights. These appellees cannot be liable

under § 1983 for the Board's action unless the appellants can show a causal connection between the appellees' conduct and the Board's action depriving appellants of a constitutional right. *Morton*, 793 F.2d at 187. The proposed complaint simply fails to allege any such nexus.

Filed 01/23/09
Civil No. 08-958 (JNE/RLE)
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Loren J. Zutz and Elden J. Elseth, Plaintiffs,
v.
John Nelson, Arlyn Stroble, Nick Drees, Douglas Kamrowski, RoughRider Legal Support Services, Inc., and Danny Omdahl,
Defendants.

ORDER

Paul A. Sortland, Esq., Sortland Law Office, appeared for Plaintiffs Loren J. Zutz and Elden J. Elseth.

Lindsay G. Arthur, Jr., Esq., Arthur Chapman Kettering Smetak & Pikala, PA, appeared for Defendants John Nelson and Arlyn Stroble.

Paula Duggan Vraa, Esq., Larson King, LLP, appeared for Defendants Nick Drees and Danny Omdahl.

Richard P. Mahoney, Mahoney Dougherty and Mahoney, PA, Esq., appeared for Defendants Douglas Kamrowski and RoughRider Legal Support Services, Inc.

Plaintiffs Loren J. Zutz and Elden J. Elseth are board members of the Middle Snake Tamarac Rivers Watershed District, and they bring this action against two other board members, Defendants John Nelson and Arlyn Stroble; the District's Administrator, Defendant Nick Drees; an employee of the District, Defendant

Danny Omdahl; and an investigator and investigative agency, Defendants Douglas Kamrowski and RoughRider Legal Support Services, Inc., respectively. Plaintiffs assert claims under 42 U.S.C. § 1983 (2000) for alleged violations of their constitutional rights, as well as claims under state law for defamation per se, defamation, and negligent defamation. Plaintiffs also seek a declaration that certain actions they have taken did not violate Minnesota law. The case is before the Court on various dispositive motions filed by Defendants. For the reasons below, the Court grants the motions and dismisses the case.

As best the Court is able to discern, the federal claims in Plaintiffs' Complaint are based on allegations of defamation, presumably in violation of Plaintiffs' Fourteenth Amendment rights to due process.[1] "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." Siegert v. Gilley, 500 U.S. 226, 233 (1991). Before damage to reputation will qualify as a liberty or property interest protected by the Fourteenth Amendment right to procedural due process, "[t]he loss of reputation must be coupled with some other tangible element," Gunderson v. Hvass, 339 F.3d 639, 644 (8th Cir. 2003), such as loss of public employment. See Siegert, 500 U.S. at 234-35; Paul v. Davis, 424 U.S. 693, 701-12 (1976); cf. Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 401 (3d Cir. 2000) (stating that, while defamation-related procedural due process claims are cognizable, "precedent makes clear that [a 'defamation-type'] claim cannot present a substantive due process violation in the first place"). In this case, neither the Complaint nor Plaintiffs' memoranda allege some other such "tangible element."

See Brown v. Simmons, 478 F.3d 922, 923 n.3 (8th Cir. 2007) (indicating that, in connection with alleged defamation, transferring an employee to a different position with less pay is insufficient to create a due process issue). Accordingly, the Court concludes that Plaintiffs fail to state a claim with respect to their defamation-based allegations regarding violation of their Fourteenth Amendment due process rights. See Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995) (indicating a motion to dismiss should be granted when the "allegations that show on the face of the complaint that there is some insuperable bar to relief "(quotation marks omitted)).

Regarding Plaintiffs' remaining claims, the Declaratory Judgment Act does not provide an independent basis for federal jurisdiction, see Victor Foods, Inc. v. Crossroads Economic Development, 977 F.2d 1224, 1227 (8th Cir. 1992), and a district court may decline to exercise supplemental jurisdiction over state-law claims if it "has dismissed all claims over which it has original jurisdiction," 28 U.S.C. § 1367(c)(3) (2006). Plaintiffs may pursue these claims in state court. In the absence of complete diversity, the Court dismisses these claims without prejudice.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendants Nelson and Stroble's Motion to Dismiss with Prejudice [Docket No. 22] is GRANTED to the extent herein indicated.

2. Defendants Drees and Omdahl's Rule 12 Motion to Dismiss [Docket No. 34] is GRANTED to the extent

herein indicated.

3. Defendants Kawrowski and RoughRider Legal Support Services' Motion for Summary Judgment [Docket No. 39] is GRANTED to the extent herein indicated.

4. Counts I, II, and VII of Plaintiffs' Complaint [Docket No. 1] are DISMISSED WITH PREJUDICE.

5. Counts III, IV, V, and VI of Plaintiffs' Complaint [Docket No. 1] are DISMISSED WITHOUT PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 23, 2009
JOAN N. ERICKSEN
United States District Judge

Footnote

[1]To the extent that Plaintiffs assert any conspiracy claim pursuant to 42 U.S.C. § 1985 (2000), the claim is conclusory and should be dismissed. See Snelling v. Westhoff, 972 F.2d 199, 200 (8th Cir.1992). In addition, Plaintiffs' memoranda indicate an intention to assert, pursuant to section 1983, a First Amendment retaliation claim. However, Plaintiffs' motion to amend the Complaint to add, among other things, a First Amendment retaliation claim was denied on the ground that the amendments would have been futile.

Filed 12/1/2008
Civil No. 08-958 (JNE/RLE)
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Loren J. Zutz and Elden J. Elseth, Plaintiffs,
v.
John Nelson, Arlyn Stroble, Nick Drees, Douglas Kamrowski, RoughRider Legal Support Services, Inc., and Danny Omdahl,
Defendants.

ORDER

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to the provisions of Title 28 U.S.C. §636(b)(1)(A), upon the Motion of the Plaintiffs Loren J. Zutz ("Zutz"), and Elden J. Elseth ("Elseth"), to Amend their Complaint. A Hearing on the Motion was conducted on October 21, 2008, at which time, the Plaintiffs appeared by Paul A. Sortland, Esq.; and the Defendants John Nelson ("Nelson"), and Arlyn Stroble ("Stroble"), appeared by Kirsten Hansen, Esq.[1] For reasons which follow, we deny the Plaintiffs' Motion.

II. Factual and Procedural Background

This is an action brought under Title 42 U. S.C. § 1983. See, Complaint, Docket No. 1. According to the Complaint, Zutz, Elseth, Nelson, and Stroble, are appointed members of the Board of the Middle Snake Tamarac Rivers Watershed District (the "District Board"), id. at Pars.14-15, while the Defendant Nick

Drees ("Drew") is the District Administrator, and the Defendant Danny Omdahl ("Omdahl") is a District employee. Id. at Pars.16, 59. According to the Plaintiffs, the Defendants Douglas Kamrowski ("Kamrowski"), and RoughRider Legal Support Services, Inc. ("RoughRider"), were hired to conduct an investigation into the District Board, and specifically, into certain activities of Zutz and Elseth. Id. at Pars.34-35.

The Plaintiffs claim that their First, Eighth, and Fourteenth Amendment rights were violated, when the Defendants allegedly conspired to defame the Plaintiffs, and to deprive them of their constitutional rights. Id. at Pars. 10, 65, 69, 89. In their original Complaint, the Plaintiffs assert the following seven (7) claims against the Defendants, collectively:

Count I:	Violation of Constitutional Rights under Section 1983, in "conspiring to issue defamatory communications." Id. at Par. 65.
Count II:	Conspiracy to Violate Civil Rights, by "acting in concert to issue a campaign of defamation and intimidation[.]" Id. at Par. 69.
Count III:	Defamation Per Se, for asserting that the Plaintiffs acted in an unlawful manner. Id. at Par.72.
Count IV:	Defamation, by making false and malicious statements. Id. at Pars.77-82.

Count V: Negligent Defamation, by negligently publishing statements which the Defendants should have known were false. Id. at Par. 84.

Count VI: Declaratory Judgment, that the Plaintiffs have not acted in an unlawful manner. Id. at Par. 87.

Count VII: Violation of Fourteenth Amendment Due Process Clause, by departing from accepted professional practices, with deliberate indifference to the harm cause by their defamatory conduct. Id. at Par. 89.

The Defendants are sued in their personal and official capacities, with the exception of Kamrowski and RoughRider, who are sued only in their official capacities. Id. at Pars. 3-8

Turning to the facts which underlie the Plaintiffs' claims, the Plaintiffs allege that, as District Board members, they had concerns about the compensation of the District's employees, which prompted them to inquire into the District's financial records at Bremer Bank, where the District held a checking account. Id. at Pars. 17-18. The Plaintiffs allege that, thereafter, at a District Board meeting on June 18, 2007 (the "June Board meeting"), Nelson and Stroble falsely claimed that the Plaintiffs had violated the Minnesota Government Data Practices Act ("MGDPA"), Minnesota Statutes Sections 13.01 et seq., when they conducted their financial inquiry. Id. at Par. 24.

The Plaintiffs deny any violation of the MGDPA, and they contend that Nelson and Stroble's statements were defamatory. Id. at Pars. 29-31. The Plaintiffs attribute two (2) allegedly defamatory statements to Nelson, including "I don't think there is much question that he [Zutz and Elseth] did [break the law]," and "[l]aws are being broken by Board Members -- enough is enough!" Id. at Pars.24, 26. The Plaintiffs also attribute one (1) allegedly defamatory statement to Stroble; namely, "Why should we provide legal counsel for actions that are against the law?" Id. at Par. 28.

The Plaintiffs further allege that, after the June Board meeting, the Defendants "conspired to coerce the Marshall County Commission to investigate the matter further * * * ." Id. at Par. 34. According to the Plaintiffs, Kamrowski and his company, RoughRider, were hired by the Marshall County Board, at the request of the Marshall County Attorney, and at the "insistence" of the Defendants, to conduct an investigation into the District Board and, specifically, into Zutz and Elseth's conduct. Id. at Pars. 34-35. On November 19, 2007, Kamrowski issued a two (2) page report, which summarized the results of his investigation, and the Plaintiffs contend that Kamrowski's report "made a number of false and slanderous allegations against Plaintiffs, pursuant to the request and instigation of Defendants." Id. at Par. 36.

In particular, Kamrowski reported that Zutz had improperly received copies of employee payroll checks, and bank statements, from the Bremer Bank; that Zutz and Elseth had retained copies of the employee payroll checks; that Zutz and Elseth were harassing District

employees; and that Zutz and Elseth were improperly "bringing up issues before the Watershed District meetings," among other things. Id. at Par. 38. Kamrowski presented his report to the Marshall County Attorney but, according to the Plaintiffs, the Marshall County Attorney found no basis upon which to seek the Plaintiffs' removal from the District Board. Id. at Pars. 40-41.

Next, the Plaintiffs allege that, notwithstanding their "exoneration" by the Marshall County Attorney, Drees conspired, with the other Defendants, in an "attempt to widely disseminate the investigator's report," and to "widely disseminate[] [false] allegations that the [District's] insurance was cancelled specifically because of the litigation brought by Zutz and Elseth against Nelson and Stroble." Id. at Pars. 44, 48.[2] The Plaintiffs further allege that, in a letter dated March 6, 2008, Drees made false and disparaging remarks about them, and about the results of the State Auditor's investigation. Id. at Pars. 50-51. The Complaint does not identify the alleged recipient or recipients of this letter.

With respect to Omdahl, the Plaintiffs allege, first, that he "joined the conspiracy to defame and disparage Plaintiffs," and they further allege that, in March of 2008, Omdahl sent a letter to the editor of a local newspaper, in which he made false and disparaging statements about the Plaintiffs. Id. at Pars. 59-61. Notably, the Plaintiffs represent that Omdahl's letter was never published. Id. at Par. 62. The Plaintiffs also allege that, on April 1, 2008, Drees and Omdahl presented their allegedly defamatory letters to the Marshall County Board. Id. at Par. 63. For relief, the

Plaintiffs seek $50,000.00 in economic and non-economic damages, plus attorney's fees, as well as a Declaratory Judgment, that their financial inquiry did not violate the MGDPA, or any other law.[3] Id. at pp. 16-17.

By way of additional background, the Defendants have filed separate Motions for Judgment on the Pleadings, or for Summary Judgment, see, Docket Nos. 22, 34, 39, which were originally set for a Hearing on September 19, 2008, before the District Court, the Honorable Joan N. Ericksen presiding. In their Motions for Judgment on the Pleadings, Nelson, Stroble, Drees, and Omdahl (collectively, the "District Defendants"), contend that this Court lacks subject matter jurisdiction, because the Plaintiffs have failed to plead any actionable Federal claim, pursuant to the First, Eighth, and Fourteenth Amendments, or to any other Federal statute.[4] See, Nelson and Stroble's Memorandum in Support, Docket No. 32, at 2; Drees and Omdahl's Memorandum in Support, Docket No. 36, at 1. Rather, the District Defendants maintain that the Plaintiffs allege nothing more than defamation claims, which arise under State law. Id.; Drees and Omdahl's Memorandum in Support, supra at 1. In addition, Nelson and Stroble assert that the doctrine of res judicata bars the Plaintiffs' claims, insofar as the current claims rely upon the same facts as the Plaintiffs' State Court action. See, Nelson and Stroble's Reply Memorandum, Docket No. 57, at 2.

In their response to the District Defendants' Motions, the Plaintiffs expressed their intention to seek leave to amend their Complaint, so as to rectify the deficiencies that were identified by the Defendants.[5] See, Plaintiffs' Memorandum in Opposition, Docket No. 50, at 18. Accordingly, by Order dated September 16, 2008, the

District Court cancelled the previously scheduled Hearing on Summary Judgment, and granted the Plaintiffs ten (10) days in which to serve and file a Motion to Amend their Complaint. See, Order, Docket No. 69. The District Court further deferred its consideration of the Defendants' Motions, pending the resolution of the Plaintiffs' Motion to Amend. Id.

The Plaintiffs now bring a Motion to Amend their Complaint, in which they seek to clarify their Section 1983 claims. See, Plaintiffs' Motion to Amend, Docket No. 73; Proposed Amended Complaint, Docket No. 77. The Plaintiffs' proposed Amended Complaint does not include a separate claim for a conspiracy, pursuant to Section 1983. Instead, the Plaintiffs seek to amend their original Count I, which asserted a generic violation of Section 1983, in order to assert two (2) new Counts pursuant to Section 1983 : 1) a violation of their First Amendment right to exercise free speech and to petition the government ("Count I"); and 2) a deprivation of property, without due process, in violation of the Fifth and Fourteenth Amendments ("Count II"). See, Proposed Amended Complaint, supra at Pars. 82-85.[6] In support of their reformulated Section 1983 claims, the Plaintiffs make several new factual allegations, which we outline more fully below. Id. at Pars. 17-20, 41-43, 49, 53, 58-61, 78-81.

Nelson and Stroble oppose the Plaintiffs' Motion, and argue that the proposed amendments would be futile. See, Nelson and Stroble's Memorandum in Opposition, Docket No. 81, at 1. In particular, Nelson and Stroble contend that the Plaintiffs' new allegations are asserted against non-parties, such as the District Board in its entirety, or the Marshall County Attorney. Id. at 4.

Nelson and Stroble also contend that the proposed Amended Complaint is "legally insufficient," given that the Plaintiffs' new claims are generalized against the Defendants, collectively, and that, as a result, the Plaintiffs improperly seek to hold the Defendants "responsible for the conduct of the Watershed District as a whole," and have made it "impossible to determine what specific acts the named Defendants are alleged to have done." Id.

We address the parties' arguments in turn.

III. Discussion

A. Standard of Review.Rule 15(a), Federal Rules of Civil Procedure, provides, in pertinent part, as follows:

> [A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

In construing this Rule, the Supreme Court has observed:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reasons -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of

> amendment, etc. -- the leave should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962); see also, Thompson-El v. Jones, 876 F.2d 66, 67 (8t" Cir. 1989).

Thus, while leave should be freely given, leave should not be afforded when the proposed amendments are futile. See, DeRoche v. All American Bottling Corp., 38 F. Supp.2d 1102, 1106 (D. Minn. 1998) ("Although we begin with a presumption of liberality, an amendment to a pleading can be successfully challenged on grounds of futility if the claims created by the amendment would not withstand a Motion to Dismiss for failure to state a claim upon which relief can be granted."), citing Humnhrevs v. Roche Biomedical Laboratories, Inc., 990 F.2d 1078, 1082 (8t" Cir. 1993); Weimer v. Amen, 870 F.2d 1400, 1407 (8th' Cir. 1989); see also, United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa, 269 F.3d 932, 936 (8th Cir. 2001)("The denial of leave to amend based on futility means that the court found that the amended complaint failed to state a claim"), cert. denied, 536 U. S. 925 (2002). "'Accordingly, futility must be assessed in the same manner as a 12(b)(6) motion. '" Berczyk v. Emerson Tool Co., 291 F. Supp.2d 1004,1018-19 (D. Minn. 2003), quoting Lumsden v. Ramsey County Cmty. Corr. Dept, 2002 WL 31886630 at * 1 (D. Minn., December 23, 2002).

B. Legal Analysis, The deadline for amending the pleadings in this matter was November 1, 2008. See, Docket No. 31. Accordingly, the Plaintiffs' Motion is timely, and we start from the presumption that leave should be freely given to an amendment of their Complaint. We turn, therefore, to consider the potential

futility of the Plaintiffs' effort to amend their Complaint.

1. The Doctrine of Res Judicata.

a. Standard of Review. "'Res judicata' is the term traditionally used to describe two discrete effects: 1) what we now call claim preclusion, which is a valid final adjudication of a claim precludes a second action on that claim or any part of it; and 2) issue preclusion, long called `collateral estoppel," which traditionally occurs where an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim." Leonard v. Southwestern Bell Corp. Disability Income Plan, 341 F.3d 696, 701 (8th Cir. 2003), citing Thomas v. General Motors Com., 522 U.S. 222, 233 n. 5 (1998).

"It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City School Dist. Board of Education, 465 U. S. 75, 81 (1984), citing Allen v. McCurry, 449 U. S. 90, 96 (1980). Accordingly, we apply Minnesota principles of res judicata to determine the preclusive effect of the State Court ruling on the Plaintiffs' proposed claims.

Under Minnesota law, "[res judicata precludes parties from raising subsequent claims in a second action when: `(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair

opportunity to litigate the matter. "' Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P, 732 N.W.2d 209, 220 (Minn. 2007), quoting Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004). "Res judicata prohibits parties from raising a claim in a second suit that was, or `could have been,' litigated in the earlier action." Drewitz v. Motorwerks, Inc., 728 N.W.2d 231, 239 (Minn. 2007), citing Hauschildt v. Beckingham, supra at 840; see also, Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P, supra at 220 ("Res judicata applies equally to claims actually litigated and to claims that could have been litigated in the earlier action."), citing State v. Joseph, 636 N.W.2d 322, 327 (Minn. 2001).
In effect, res judicata "is essentially a finality doctrine which dictates that there be an end to litigation." Dorso Trailer v. American Body & Trailer, 482 N.W.2d 771, 773-74 (Minn. 1992), citing Federated Mutual Ins. Co. v. Litchfield Prec. Comb., Inc., 456 N.W.2d 434, 438 (Minn. 1990). Accordingly, it is "well established in Minnesota that a party `should not be twice vexed for the same cause, and that it is for the public good that there be an end to litigation."' Hauser v. Mealey, 263 N.W.2d 803, 807 (Minn. 1978), quoting Shims v. Sederstrom, 233 N.W.2d 292, 294 (Minn. 1975).

In determining the scope of preclusion, that a prior State Court Judgment will exact, we necessarily look to the governing law of Minnesota. See, Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 375 (1985)(a Federal Court must first consider the law of the State in which a Judgment was rendered when determining the preclusive effect to be accorded that Judgment), reh'g denied, 471 U.S. 1062 (1985). Under Minnesota law, which is applicable here, "'[a]judgment on the merits constitutes an absolute bar

to a second suit for the same cause of action, and is conclusive between parties and their privies * * *. '" U. S. West Financial Services, Inc. v. Buhler, Inc., 150 F.3d 929, 932 (8th Cir. 1998), quoting Dorso Trailer Sales, Inc. v. American Body & Trailer, supra at 774, quoting, in turn, Mattsen v. Packman, 358 N.W.2d 48, 49 (Minn. 1984).

Lastly, "[a] dismissal with prejudice, even if based on nonsubstantive grounds, is an adjudication on the merits and can form a basis for res judicata." Nielsen v. Eller Media Co., 2008 WL 1747893 at *3 (Minn. App., April 15, 2008), citing Johnson v. Hunter, 447 N.W.2d 871, 873 (Minn. 1989). Moreover, "a judgment becomes final when it is entered in the district court regardless of a pending appeal," because, under Minnesota law, "an appeal does not affect the preclusive nature of a judgment." Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P., supra at 220, citing Wegge v. Wegge, 89 N.W.2d 891, 892 (Mine. 1958), Wilcox Trux, Inc. v. Rosenberger, 209 N.W. 308, 310 (Minn. 1926), Schoonmaker v. St. Paul Title & Trust Co., 188 N.W. 223, 224 (Minn. 1922), and State v. Spratt, 184 N.W. 31, 32 (Minn. 1921).

b. Legal Analysis As noted, see, Footnote 2, supra, on August 17, 2007, Zutz and Elseth filed a State Court action against Nelson and Stroble for defamation per se, slander, negligent defamation, and for a Declaratory Judgment, based upon the statements of Nelson and Stroble at the June Board meeting. See, First Affidavit of Kirsten J. Hansen ("First Hansen Aff."), Docket No. 33, Exhibit A ("State Court Complaint").[7] On March 7, 2008, Nelson and Stroble filed a Motion for Judgment on the Pleadings, in which they sought dismissal of the

Plaintiffs' Complaint in State Court, and that Motion was heard, by the State Court, on May 6, 2008. See, First Hansen Aff., supra at Par. 3. In the interim, on April 4, 2008, the Plaintiffs commenced this Federal action. See, Complaint, supra.

Thereafter, on July 31, 2008, the State Court granted the Motion of Nelson and Stroble, and dismissed the Plaintiffs' claims with prejudice.[8] See, Second Affidavit of Kirsten J. Hansen ("Second Hansen Aff."), Docket No. 60, Exhibit 1 ("State Court Order"). In its Order, the State Court held that Nelson and Stroble "hold an absolute privilege for statements made as appointed board members of a political subdivision of the State of Minnesota, speaking on pertinent matters of the Watershed District." Id. at p. 8. The Court explained that the privilege applies "even for intentionally false and malicious statements." Id. at p. 7, citing Buchanan v. Minnesota Dept of Health, 573 N.W.2d 733 (Minn.App. 1998), rev. denied (Minn., April 30, 1998), citing, in turn, LeBaron v. Minnesota Board of Public Defense, 67 N.W.2d 413, 416 (Mine. 1954). The State Court noted that the allegedly defamatory statements were made during the June Board meeting, "regarding recent actions by specific board members," and it further noted that Nelson and Stroble "have a resolute interest in confirming that no illegal activities occur within the [District]." Id. at p. 8. Accordingly, the Court dismissed the Plaintiffs' claims in their entirety, on the merits, and with prejudice. Id. at p. 9.

Plainly, the State Court action involved the same factual circumstances as the Plaintiffs now seek to raise, by way of their Complaint and proposed Amended Complaint, in Federal Court -- at least with

respect to their claims against Nelson and Stroble. The pertinent parties, in both the State Court action, and this Federal case, are identical. Moreover, the State Court action resulted in a final Judgment, and it cannot be said that the Plaintiffs did not have a full and fair opportunity to litigate the State action, nor have they shown any objectively legitimate basis upon which to make any such claim.

Of course, we are mindful that, in the earlier State Court action, the Plaintiffs did not expressly include Federal claims under Section 1983, or under the Fourteenth Amendment. Such a difference in the legal theories of recovery, however, does not vitiate the preclusive effect of the prior State Court Judgment. As the Court explained, in Hauschildt v. Beckingham, supra at 840-41:

> Therefore, the focus of res judicata is whether the second claim "arise[s] out of the same set of factual circumstances." Hauser [v. Mealey, 263 N.W.2d 803,] 807 [(Minn. 1978)]; see also Meagher ex rel. Pension Plan v. Bd. of Trustees of Pension Plan, 921 F. Supp. 161, 167 (S.D.N.Y. 1995)(stating "the facts surrounding the occurrence which constitutes the cause of action -- not the legal theory upon which [plaintiff) chose to frame his complaint -- must be identical in both actions to trigger res judicata."), aff'd, 79 F.3d 256 (2nd Cir. 1996)).
>
> The "common test for determining whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence will sustain both actions." McMenomy v. Ryden, 276

> Minn. 55, 58, 148 N.W.2d 804, 807 (1967). In addition, claims cannot be considered the same cause of action if "the right to assert the second claim did not arise at the same time as the right to assert the first claim." [Care Inst., Inc.-Roseville v. County of Ramsey, 612 N.W.2d 443,] 447 [(Minn. 2000)].

[Emphasis in original].

As we have explained, the factual circumstances of both the State Court action, and of the Plaintiffs' current claims against Nelson and Stroble, are identical. There is no reason why the Plaintiffs could not have raised any constitutional issues in the State Court proceeding, which arise out of Nelson and Stroble's allegedly defamatory conduct at the June Board meeting, and that they might now seek to assert here.

Accordingly, the Plaintiffs' proposed claims against Nelson and Stroble, insofar as they relate to the June Board meeting, are barred by res judicata, and therefore, are futile.[9] The barred claims include the Plaintiffs' proposed First Amendment claim, to the extent that they allege that Nelson and Stroble defamed them, in retaliation for their exercise of free speech, by publicly criticizing and investigating the District, and in retaliation for their exercise of their right to petition, by filing or participating in litigation against the District. Nonetheless, we turn to consider whether the Plaintiffs' remaining allegations are sufficient to support their newly-proposed claims.

2. The Plaintiffs' General Allegations. First, we consider the contention of Nelson and Stroble that the

Plaintiffs cannot assert new claims against the named Defendants, based upon actions taken by non-parties, including the District, its Board, and the Marshall County Attorney.

In their proposed Amended Complaint, the Plaintiffs allege that they have been the victims of retaliation, after exercising their constitutionally protected rights, and they have added several factual allegations in support of that contention. The Plaintiffs allege that, prior to his appointment to the District Board, Zutz sued the District "for alleged inadequate payments for property taken from him by the [District]." See, Proposed Amended Complaint, supra at Par. 17. The Plaintiffs also allege that Elseth spoke out against a District project, including his expression of concerns about the project to the Army Corps of Engineers. Id. at Pars.18-19. The Plaintiffs further allege that they "attempted to speak out about these issues," both before and after their appointment to the District Board. Id. at Par. 20.

The Plaintiffs also allege that their "free speech and the right to petition government for these purposes, has been stifled * * * [and] severely limited," id. at Par. 20, because the Defendants, collectively, are "punish[ing]" and "retaliat[ing]" against the Plaintiffs, for their refusal to resign their positions, for their statements and concerns about employee compensation and public compensation, and for Zutz's participation in litigation against the District, prior to his appointment. Id. at Par. 38.

With respect to the alleged retaliatory conduct, the Plaintiffs allege that the Defendants, collectively, have

barred them from serving on District subcommittees, and that they are no longer authorized to sign checks on behalf of the Board. Id. at Pars.78-79. The Plaintiffs further allege that the Defendants refused to renew Zutz's lease of farming land. Id. at Pars.38-39. Lastly, the Plaintiffs allege that "[t]he Kamrowski investigation was done in an attempt to stifle our speech activities," notwithstanding their representation that the Marshall County Board authorized the investigation, at the request of the Marshall County Attorney. Id. at Par. 53. In response, Nelson and Stroble urge that the Plaintiffs are improperly attempting to hold the individual Defendants responsible for the conduct of non-parties, including the District, or its Board as a whole. See, Nelson and Stroble's Memorandum in Opposition, supra at 4.

In order to sustain a claim under Section 1983, a plaintiff must demonstrate that the named defendants were directly and personally involved in the illegal actions, or in the policy decision which created the unlawful context for those actions. See, e.g., Beck v. LaFleur, 257 F.3d 764, 766 (8t" Cir. 2001); McNair v. Norris, 2000 WL 490709 at * 1 (8th Cir., Apri127, 2000); Martin v. Sergeant, 780 F.2d 1334, 1337 (8th Cir. 1985). Moreover, Complaints must be prepared "in a fashion that will identify the constitutional claims as against only culpable defendants." Liggins v. Morris, 749 F. Supp. 967, 971 (D. Minn. 1990). As we advised at the Hearing, since at least 1990, this District has not permitted a "shotgun approach" to pleading Section 1983 claims, where "all possible constitutional violations and all common law claims are asserted on behalf of all plaintiffs against all named defendants," and "[i]t is then left to the court to divine what discrete

constitutional violations are in fact legitimate and proper as to each plaintiff and as against each defendant." Id. at 970-971.

Here, the Plaintiffs do even less, given that have asserted wrongful conduct which can only be attributed to the District, or to its Board as a whole, notwithstanding the Plaintiffs' strained attempts to attribute those acts to the named Defendants, whether individually or collectively. See, Wells v. Schnick, 2008 WL 4110697 at *7 (D. Minn., August 27, 2008)(granting Motion to Dismiss, "[g]iven the absence of any allegation that Utech was personally, and directly, involved in any constitutional wrong that the Plaintiff seeks to vindicate"). Indeed, at the Hearing, the parties represented that the District Board consists of at least seven (7) members, which leads us to the inescapable conclusion that Nelson and Stroble could not be solely responsible for the Board's actions, as they do not constitute a majority of the Board's members. As we advised at the Hearing, we cannot comprehend how the Plaintiffs could recover against the named Defendants, for any wrongful actions taken by the Board as a whole.

In an analogous case, a District Court considered a First Amendment retaliation claim, in which a City employee claimed that he had been terminated for exercising his right to free speech. See, Criswell v. City of O'Fallon, 2007 WL 1760744 (E.D. Mo., June 15, 2007). There, the Court noted that the City was the actual employer, and therefore, was responsible for the decision to terminate the plaintiff's employment. Id. at *4. Accordingly, the Court dismissed the plaintiff's claims against the City council members and mayor because, "[i]f the City Councilmen and Mayor lacked

the authority to terminate Plaintiff, those Defendants cannot be liable for the [retaliatory] conduct complained of, namely Plaintiff's termination." Id. The Court further observed that, "[e]ven if Plaintiff's complaint can be read to allege knowledge of Plaintiff's protected speech, there are no allegations that the City Councilmen or the Mayor were involved in the employment decisions, and therefore cannot be liable under 42 U.S.C. § 1983." Id.

Here, the Plaintiffs have not specifically alleged that any of the named Defendants, whether singly or in combination, can bar them from subcommittees, revoke their authority to sign checks, refuse to renew a lease, or demand that the Marshall County Attorney conduct an investigation. In addition, given that the Plaintiffs have sued only two (2) of seven (7) Board members, we find no basis to believe that Nelson and Stroble could have taken the allegedly retaliatory acts, without at least partial agreement by some of the remaining Board members, who are not named as Defendants. As a result, we find that the Plaintiffs have not alleged any direct and personal involvement by the Defendants, whether to bar them from the District Board's subcommittees, to revoke their check-writing authority, or to refuse to renew Zutz's lease, such as would support a Section 1983 claim. Accordingly, we find that the Plaintiffs' proposed amendment is futile, insofar as the Plaintiffs seek to add allegations concerning retaliatory conduct by the District, or its Board.

Indeed, the Plaintiffs do not allege a single retaliatory act by any of the named Defendants.[10] In their proposed Amended Complaint, the Plaintiffs allege that the

District has accused Zutz of encroaching on District property, while ignoring "other actual encroachments," Proposed Amended Complaint, supra at Par. 80, and that the District publicly censured Elseth for his statements to the Army Corps of Engineers. Id. at Par. 60. The Plaintiffs further allege that the Marshall County Attorney misrepresented the nature of Kamrowski's investigation to the Marshall County Board.[11] Id. at Par. 41.

Accordingly, the Plaintiffs have failed to allege that the named Defendants were personally involved in any alleged, retaliatory conduct, and they have further failed to allege that the named Defendants could be held responsible for any such conduct. Therefore, we deny their Motion to Amend, as futile, insofar as the Plaintiffs seek to add allegations against non-parties.

3. The Proposed First Amendment Claims.

a. The Free Speech Claim. In Naucke v. City of Park Hills, 284 F.3d 923, 927-28 (8th Cir. 2002), our Court of Appeals explained the standard to be applied to the Plaintiffs' free speech claim, as follows:

> "[C]riticism of public officials lies at the very core of speech protected by the First Amendment." Colson v. Grohman, 174 F.3d 498, 507 (5th Cir. 1999)(citing New York Times Co. v. Sullivan, 376 U.S. 254, 269-70, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). Retaliation by a government actor in response to such an exercise of First Amendment rights forms a basis for § 1983 liability. Pendleton v. St. Louis County, 178 F.3d 1007, 1011 (8th Cir. 1999). To

> establish a claim for retaliation under § 1983, a plaintiff must show "she was engaged in constitutionally protected activity, that [the government official's] adverse action caused her to suffer an injury which would 'chill a person of ordinary firmness from continuing * * * in that activity,' and that the adverse action was motivated in part by exercise of her constitutional rights." Carroll v. Pfeffer, 262 F.3d 847, 850 (8th Cir. 2001)(quoting Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998))[, cent. denied, 536 U.S. 907 (2002)].

Consequently, in order to state a First Amendment retaliation claim, pursuant to Section 1983, the Plaintiffs need only allege: 1) that they were engaged in constitutionally protected activity; 2) that government officials took adverse action that would chill a person of ordinary firmness from engaging in the activity; and 3) that the adverse action was motivated, in part, by the Plaintiffs' exercise of their constitutional rights. See, Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004), cent. denied, 546 U.S. 860 (2005), citing Naucke v. City of Park Hills, supra at 927-928; Hodak v. City of St. Peters, 2006 WL 3004052 at *3 (E.D. Mo., October 20, 2006).

"In non-employment contexts, a person suffers an adverse action if a reasonable person of ordinary firmness would be deterred from continuing to exercise his right to free speech." Hodak v. City of St. Peters, supra at *7, citing Garcia v. City of Trenton, 348 F.3d 726, 728-29 (8th Cir. 2003). "The ordinary-firmness test is well established in the case law, and is designed to weed out trivial matters from those deserving the time

of the courts as real and substantial violations of the First Amendment." Garcia v. City of Trenton, Missouri, supra at 728, citing Bart v. Telford, 677 F.2d 622 (7th Cir. 1982). "The test is an objective one, not subjective," and "[t]he question is not whether the plaintiff herself was deterred, though how the plaintiff acted might be evidence of what a reasonable person would have done." Id. at 729.

Here, the Plaintiffs have clearly alleged that they were engaged in constitutionally protected activity, when they complained about the District's conduct as both private citizens, and as Board members. See, Osborne v. Grussing, 477 F.3d 1002, 1005 (8th Cir. 2007)("[I]t is clear that [the plaintiffs] engaged in First Amendment-protected activity when they publicly criticized the County's enforcement practices[.]"); see also, Naucke v. City of Park Hills, supra at 927. Moreover, the Plaintiffs have alleged retaliatory actions that -- if taken by the named Defendants -- would be "sufficiently egregious to 'chill a person of ordinary firmness from continuing * * * in that [constitutionally protected] activity. '" Naucke v. City of Park Hills, supra at 928, quoting Bloch v. Ribar, supra at 678.

As noted, the Plaintiffs allege that the Defendants attempted to stifle their speech, in part, by investigating the Plaintiffs' allegedly unlawful acts. This allegation alone is insufficient to support a First Amendment claim. In Naucke, our Court of Appeals held that similar allegations of retaliatory conduct were not sufficient to sustain a First Amendment retaliation claim, namely "(1) conducting a public audit of the fire department's ladies' auxiliary while she was President, (2) publicly scolding her at City Council meetings, (3)

engaging in public name calling, (4) posting a picture of her home in a public place with the caption `The Naucke House. Donations Needed.', and (5) circulating a letter suggesting Link was the father of one of her children." Id. at 927; compare Colson v. Grohman, 174 F.3d 498, 512 (5th Cir. 1999)("Colson has alleged only that she was the victim of criticism, an investigation (or an attempt to start one), and false accusations: all harms that, while they may chill speech, are not actionable under our First Amendment retaliation jurisprudence."). As noted by the Naucke Court, "'it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise. '" Naucke v. City of Park Hills, supra at 928, quoting Bloch v. Ribar, supra at 679, quoting in turn Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982).

Nonetheless, the Plaintiffs also allege that they were subjected to retaliation when the District, and its Board, refused to lease land to Zutz, barred the Plaintiffs from Board subcommittees, and revoked the Plaintiffs' authority to sign checks on behalf of the District. Such allegations could be sufficient to state a retaliation claim under the First Amendment. Compare, Garcia v. City of Trenton, supra at 729 (fording that the receipt of four (4) parking tickets in less than two (2) months, for a total of $35.00 in fines, was sufficient to support a retaliation claim, because "[h]ere, in contrast to Naucke, defendant's conduct went beyond mere speech * * * ."); Allen v. City of Kirkwood, 2005 WL 2033429 at *4 (E.D. Mo., August 18, 2005)(denying a Motion to Dismiss, because "a five-month barrage of thirty-four municipal citations in

response to Allen's public criticism would be sufficient to `chill a person of ordinary firmness' from freely speaking out at city meetings in the future"); cf., Colson v. Grohman, supra at 513 (observing that the misuse of a recall statute could support a First Amendment retaliation claim, but not where the plaintiff "was never subjected to a recall election").

However, since the Plaintiffs do not allege that the named Defendants were personally responsible for that retaliatory conduct -- for reasons we have previously detailed -- we conclude that the Plaintiffs' proposed Amended Complaint does not state a First Amendment retaliation claim. Accordingly, we deny the Motion to Amend, insofar as it relates to the First Amendment claim.

b. The Right to Petition Claim. The Plaintiffs similarly assert that the Defendants retaliated against them for exercising their First Amendment right to petition the Government. See, Proposed Amended Complaint, supra at Pars. 83-85. As previously noted, the Plaintiffs have alleged that Zutz had been involved in litigation against the District, and in this Circuit, the Plaintiffs' right of access to the Courts is viewed as a component of the First Amendment right to petition the government for redress of grievances. See, Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422, 1426 (8th Cir. 1986); see also, Valot v. Southeast Local Sch. Dist. Bd. of Edu., 107 F.3d 1220, 1226 (6th Cir. 1997)("In our judgment, Plaintiffs' claim is best viewed as a claim under the Petition Clause, for that provision expressly protects conduct most like the conduct for which Plaintiffs seek protection from retaliation."). As our Court of Appeals has explained:

> An individual's constitutional right of access to the courts "cannot be impaired, either directly * * * or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits. It is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual's] right of access." Sanders [v. St. Louis County] , 724 F.2d [665, 666 (8th Cir. 1983)]. The cases from this Circuit, as well as from others, make clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. See, e.g., id.; Garland [v. Polley], 594 F.2d [1220, 1223 (8th Cir. 1979)]; Hall v. Sutton, 755 F.2d 786, 787 (11th Cir. 1985); Matzker v. Herr, 748 F.2d 1142, 1150-51 (7th Cir. 1984)("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper."); Lamar v. Steel, 693 F.2d 559, 562 (5th Cir. 1982), cert. denied, 464 U.S. 821, 104 S.Ct. 86, 78 L.Ed.2d 95 (1983); Milhouse v. Carlson, 652 F.2d 371, 374 (3d Cir. 1981); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976). An individual is entitled to "free and unhampered access to the courts." United States ex rel. Cleettv. Pate, 229 F. Supp. 818, 821-22 (N.D. Ill. 1964). Harrison v. Snringdale Water & Sewer Commission, supra at 1427-28.

By way of an example, in Harrison, the Court

determined that the plaintiffs' Complaint stated a cognizable cause of action, based on a denial of access to the Courts, where the Complaint alleged that, in a suit by the plaintiffs against State actors, the State actors admitted to prosecuting a factually unsupported Counterclaim against the plaintiffs solely as a tactical means to pressure them into settling their case. Id. at 1428. Thus, while the plaintiffs' ability to file a lawsuit was not directly constrained, the Court found, nonetheless, that the defendants applied sufficient indirect pressure to restrict the plaintiffs' access to the Courts.

Here, the Plaintiffs' general allegations of retaliation relate to both their "speech activities," as we have detailed, and to Zutz's previous litigation against the District, as both a private citizen and as a public official. See, Proposed Amended Complaint, supra at Pars. 20, 38. Accordingly, the Plaintiffs have alleged retaliatory conduct which could support a claim, pursuant to their First Amendment right to petition. See, Stepnes v. Tennessen, 2006 WL 2375645 at *9 (D. Minn., August 16, 2006), aff'd, 267 Fed.Appx. 481 (8t" Cir. 2008)(reciting the elements for a retaliation claim, pursuant to the Petition Clause, which are identical to the elements for a retaliation based upon the exercise of free speech), citing Revels v. Vincenz, supra at 876.

However, because the Plaintiffs have not alleged that the named Defendants were personally responsible for the alleged retaliatory conduct, we conclude that their proposed claim is futile, for the reasons we expressed with respect to their free speech claim. Accordingly, we deny the Plaintiffs' Motion to Amend, with respect to this claim, as futile.

4. The Proposed Fifth and Fourteenth Amendment Claim. Contrary to the assertion of Nelson and Stroble, the Plaintiffs do not appear to assert a claimed deprivation of real property without due process.See, Nelson and Stroble's Memorandum in Opposition, supra at 3. ("[A]pparently based on the Watershed District's refusal to lease property, Plaintiffs claim that they have been deprived of property under the Fifth and Fourteenth Amendments."). It is true that the Plaintiffs allege that the District refused to renew a lease to Zutz, thereby costing him $92,000.00 in farming income. See, ProposedAmended Complaint, supra at Pars. 38-39. In addition, the Plaintiffs contend that the District "refused to remove all asbestos laden pipe that was left unused on [Elseth's] property," and "failed to provide compensation for said removal or trespass by the water system." Id. at Par. 19.

However, the proposed Amended Complaint does not include a Count which relates to Zutz's lease, or Elseth's water connection. Instead, Count II of the proposed Amended Complaint plainly alleges that the Defendants "conspir[ed] to issue defamatory communications, in a direct effort to harm the reputation, livelihood and relations of Plaintiffs," and that such "retaliatory conduct constitutes a deprivation of property without due process, in violation of the Fifth and Fourteenth Amendments[.]" Proposed Amended Complaint, supra at Pars. 87-89. Accordingly, it appears that the Plaintiffs seek to add a procedural due process claim, under the Fifth and Fourteenth Amendments, for the alleged damage to their reputations.[12]

Procedural due process requires that the Government

provide fair procedures to afford its citizens an opportunity to prevent a loss of life, liberty, or property. See, Birkenholtz v. Slums, 857 F.2d 1214, 1216 (8th Cir. 1988), citing Hurtado v. California, 110 U.S. 516, 531 (1884). "'In a procedural due process claim, it is not the deprivation of property or liberty which is unconstitutional; it is the deprivation of property or liberty without due process of law -- without adequate procedures. '" Id., quoting Daniels v. Williams, 474 U.S. 327, 339 (1986)(Stevens, J., concurring) [emphasis in original].

"In Board of Regents v. Roth, [408 U.S. 564, 573 (1972)], the Supreme Court held that a government employee has a liberty interest in his or her good name and reputation, which is entitled to protection when he or she is fired based on allegations of dishonesty, immorality, or illegality." Hammer v. City of Osage Beach, 318 F.3d 832, 839 (8th Cir. 2003). Accordingly, "[t]he Eighth Circuit has held that an employee's liberty interests are implicated 'where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges. '" Rush v. Perryman, 2007 WL 2091745 at *5 (E.D. Ark., July 17, 2007), quoting Putnam v. Keller, 332 F.3d 541, 546 (8th Cir. 2003). "A deprivation of a constitutional magnitude may occur if such an employee is not granted the opportunity to clear his or her name." Id., quoting Coleman v. Reed, 147 F.3d 751, 755 (8th Cir. 1998). Therefore, "[i]n order to establish a procedural due process claim for the loss of this protected liberty interest, [the plaintiff) must show (1) he was stigmatized by the allegations which resulted in his discharge; (2) Defendants made the allegations public; and (3) he denied the allegations." Id., citing Coleman v.

Reed, supra at 755.

Here, the Plaintiffs allege, throughout their proposed Amended Complaint, that the Defendants have engaged in defamatory conduct, by accusing the Plaintiffs of unlawful acts, and they further allege that the Defendants have widely disseminated their false and defamatory statements to the public. See, Proposed Amended Complaint, supra at Pars. 43, 45, 47-49, 54-55, 64-67, 74, 77; compare, Stodghill v. Wellston School Dist., 512 F.3d 472, 476 (8th Cir. 2008)("In reviewing whether allegedly defamatory statements are sufficient to warrant a right to a name clearing hearing, `[t]he requisite stigma has generally been found when an employer has accused an employee of dishonesty, immorality, criminality, racism, and the like. "')[emphasis added], quoting Buchholz v. Aldaya, 210 F.3d 862, 866 (8th Cir. 2000). The Plaintiffs maintain that, as a result, they have suffered serious harm to their reputations, and they generically allege that this harm has affected their property, their standing in the community, and their economic activity, id. at Par. 81, and placed their appointed positions on the District Board "in jeopardy." Id. at Pars. 37, 69.

However, the case law, which supports this type of procedural due process claim, applies in circumstances where a public employee is discharged from his position, which is not the circumstance here. See, e.g., Neal v. Fields, 429 F.3d 1165, 1167-1168 (8th Cir. 2005); Graning v. Sherburne County, 172 F.3d 611, 616 (8th Cir. 1999); Schleck v. Ramsey County, 939 F.2d 638, 642-643 (8th Cir. 1991); Rivkin v. Hennepin County, 2002 WL 31777800 at *3 (D. Minn., December 12, 2002)("The claimed damage to the plaintiff's reputation,

however, must occur during the course of the plaintiffs termination.")[citations omitted].

In contrast, a plaintiff's mere "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, * * * [a]nd any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any `liberty' or `property' recognized by state or federal law." Paul v. Davis, 424 U.S. 693, 712 (1976); Brown v. Simmons, 478 F.3d 922, 924 (8th Cir. 2007)("Injury to a person's reputation alone is not sufficient to trigger the procedural protections of the due process clause."); Hughes v. Whitmer, 714 F.2d 1407, 1417 (8th Cir. 1983), cert. denied, 465 U.S. 1023 (1984)("[W]ithout a change of legal status, a stigmatized public employee's cause of action is simply one for defamation under state law and is for the state courts to entertain.")[footnote omitted], citing Meachum v. Fano, 427 U.S. 215, 226, 228-29 (1976).

Here, assuming that a Roth claim can be asserted by an appointed official, and not just by a public employee, the Plaintiffs' proposed claim still fails, since the Plaintiffs have not been terminated from their positions on the District Board. See, Brown v. Simmons, supra at 923 ("Brown's complaint failed to allege any alteration or extinguishment of a right or legal status," notwithstanding the plaintiff's claim that he had been subjected to an internal transfer.); Neal v. Fields, supra at 1167-1168 (affirming dismissal of a procedural due process claim, based upon the nurse-plaintiff's allegation "that the Board's disclosure of a pending investigation casts an injurious cloud on her fitness as a nurse, making her less employable," as the plaintiff "is

not a terminated public employee, nor has she suffered the arguably analogous injury of license revocation"); cf., Kloch v. Kohl, 2005 WL 3358985 at *4 (D. Neb., December 8, 2005)(denying Motion to Dismiss, where the physician-plaintiff alleged that the licensing board had placed a "letter of concern" in his file, thereby damaging his reputation without an opportunity to clear his name). In their proposed Amended Complaint, we find that the Plaintiffs have not alleged anything more than an injury to their reputations, which is not sufficient to support a procedural due process claim. Therefore, we deny their Motion to Amend in this respect on futility grounds.

In sum, we conclude that the Plaintiffs' proposed amendments are futile, and we deny their Motion to Amend in its entirety.

NOW, THEREFORE, It is ORDERED:

That the Plaintiffs' Motion to Amend the Complaint [Docket No. 73] is DENIED.

BY THE COURT:
Raymond L. Erickson
Dated: December 1, 2008

CHIEF U.S. MAGISTRATE JUDGE

Footnotes

[1]The remaining Defendants have advised that they do not oppose the Plaintiffs' Motion. See, Drees and Omdahl's Response, Docket No. 83; Kamrowski and RoughRider's Response, Docket No. 82. Accordingly, at

the Hearing, no appearance was made by, or on behalf of, the remaining Defendants.

[2]Here, the Complaint apparently refers to a State Court action, which was filed on August 17, 2007, and in which Zutz and Elseth assert claims against Nelson and Stroble for defamation per se, slander, negligent defamation, and seek a Declaratory Judgment, based upon the statements of Nelson and Stroble at the June Board meeting. See, First Affidavit of Kirsten J. Hansen ("First Hansen Aff."), Docket No. 33, Exhibit A ("State Court Complaint"). The disposition of the State Court action is addressed more fully in the text of this Opinion.

[3]Assertedly, the Plaintiffs' non-economic damages include harm to their reputations, mental distress and embarrassment, public scrutiny, and the risk of losing their appointed positions. See, Complaint, supra at Pars. 33, 82.

[4]In contrast, Kamrowski and RoughRider seek Summary Judgment, based upon their contention that they did not publish any allegedly defamatory materials, and that they are entitled to absolute prosecutorial immunity for their investigation. See, Kamrowski and RoughRider's Memorandum in Support, Docket No. 41, at 2.

[5]In their response to the District Defendants' Motions, the Plaintiffs also maintained that their Complaint states a First Amendment claim for retaliation, a Procedural Due Process claim under the Fourteenth Amendment, and a conspiracy claim, pursuant to Title 42 U.S.C. § 1983. See, Plaintiffs' Memorandum in Opposition, Docket No. 50, at 9, 15, 16, 18. However, the Plaintiffs admit that did not sufficiently plead a claim pursuant to the Eighth Amendment. Id.

[6]Counts III through VII of the proposed Amended

Complaint are identical to the Plaintiffs' original claims for defamation, for a Declaratory Judgment, and for a violation of the Fourteenth Amendment. See, Proposed Amended Complaint, supra at Pars. 90-109.

[7]All of the Plaintiffs' factual allegations, in their State Court Complaint, are repeated in their original Federal Complaint, with only minor changes. However, the original Federal Complaint contains a number of additional allegations, given that the Plaintiffs' now assert claims against Drees, Omdahl, Kamrowski, and RoughRider.

[8]On October 10, 2008, the Plaintiffs filed an appeal of the State Court's decision with the Minnesota Court of Appeals, where it remains pending. See, Zutz v. Nelson, Case No. A08-1764, available online at http://macsnc.courts.state.mn.us.

[9]At the Hearing, the Plaintiffs argued that their remaining allegations are not barred by res judicata because the events in question, such as Kamrowski's report, and Drees and Omdahl's letters, occurred after August 17, 2007 – i.e., after the filing of their State Court Complaint -- and therefore, those allegations could not have been asserted in the State Court action. See, Proposed Amended Complaint, supra at Par. 45, 49, 51, 55, 59, 63-65, 74, 77 (allegations dating from November 19, 2007, through April 1, 2008). We consider those claims more fully in subsequent sections of this Order.

[10]The only possible exception is the Plaintiffs' allegation that Kamrowski conducted an investigation. However, at the Hearing, counsel for the Plaintiffs represented that the Plaintiffs did not object to the investigation per se -- rather, they contend only that Kamrowski's report contained defamatory statements. Moreover, in their proposed Amended Complaint, the Plaintiffs admit that

Kamrowski's investigation was authorized the Marshall County Board -- not by the District or its Board -- at the request of the Marshall County Attorney. See, Proposed Amended Complaint, supra at Pars. 41, 44, 53. Accordingly, the Plaintiffs do not allege that Kamrowski engaged in retaliatory conduct when he commenced his investigation.

[11]Interestingly, at the Hearing, counsel for the Plaintiffs described the Marshall County Attorney as a "hero," and further represented that the Plaintiffs have no complaints concerning the Marshall County Attorney's conduct.

[12]In addition, our review of the proposed Amended Complaint does not disclose any basis to conclude that the Plaintiffs intend to assert a deprivation of a property interest that relates to their positions as District Board members, although they claim that they have been barred from participating on subcommittees, in retaliation for exercising their constitutional rights. Again, the proposed Count II, under the Fifth and Fourteenth Amendments, focuses only upon the alleged harm to the Plaintiffs' reputations.

Filed 5/27/10
No. 09-1462
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Loren J. Zutz; Elden J. Elseth,
Appellants,
v.
John Nelson; Arlyn Stroble; Nick Drees; Douglas Kamrowski; RoughRider Legal Support Services, Inc.; Danny Omdahl,
Appellees.

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:08-cv-00958-JNE)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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(2)

No. 10-304

Supreme Court, U.S.
FILED
SEP 28 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LOREN J. ZUTZ; ELDEN J. ELSETH,

Petitioners,

v.

JOHN NELSON; ARLYN STROBLE; NICK DREES; DOUGLAS KAMROWSKI; ROUGHRIDER LEGAL SUPPORT SERVICES, INC.; DANNY OMDAHL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF KAMROWSKI AND ROUGHRIDER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD P. MAHONEY
Counsel of Record
VICTOR LUND
MAHONEY, DOUGHERTY & MAHONEY, P.A.
801 Park Avenue
Minneapolis, MN 55404
(612) 339-5863
rmahoney@mahoney-law.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Douglas Kamrowski and RoughRider Legal Support Services, Inc. submit this memorandum in opposition to the Petition of petitioners Loren J. Zutz and Elden J. Elseth for a Writ of Certiorari docketed in this Court on August 31, 2010.

OPINIONS BELOW

Respondents Kamrowski and RoughRider take no issue with petitioners' statement of the opinions below, basis for federal jurisdiction, citation to the relevant provisions, and statement of the case.

ARGUMENT

Reasons to Deny the Petition

I. PETITIONERS FAILED TO PRESERVE THE ISSUE WHETHER INJURY TO REPUTATION ALONE STATES A FEDERAL CLAIM.

One issue which petitioners purport to raise is whether this Court should revisit its decision of *Paul v. Davis*, 424 U.S. 693 (1976) and reconsider its holding therein that injury to reputation, standing alone, does not assert a violation of any federally guaranteed right; in other words, that defamation is purely a matter of state law, not federal law.

Petitioners failed to preserve this issue. They did not raise it in any court below. The decisions of the district court and Eighth Circuit Court of Appeals do not address the issue because petitioners did not raise it. Petitioners raised what is known as a stigma/plus claim. They argued that they had the plus, but they never argued that they should have a federal claim in the absence of the plus.

Absent exceptional circumstances, this Court does not review issues not presented in the lower courts or issues otherwise not sufficiently developed to permit a meaningful review in this Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645, 646 (1992); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). This Court is a court of review rather than a court of original jurisdiction except in highly unusual circumstances. There is no reason why this Court should accept original jurisdiction of this issue.

II. THE COURTS BELOW PROPERLY FOUND NO PLAUSIBLE SHOWING OF ANY CAUSATIVE NEXUS BETWEEN THE ACTS OF RESPONDENTS AND THE INJURIES ALLEGEDLY INFLICTED UPON PETITIONERS BY DECISION OF THE BOARD AS A WHOLE.

The Eighth Circuit affirmed dismissal of petitioners' complaint on the basis that their proposed amended complaint "fails to plausibly allege a causal connection between the appellees' [respondents'] conduct and any constitutional deprivation."

(Petitioners' Appendix 15a) This conclusion is manifestly correct. Petitioners have adduced no sound reason to review the decision. This Court should deny the Petition for Writ of Certiorari.

The additional harm which petitioners allege are actions taken by the entire Watershed District Board. There are seven members of the Board, of whom petitioners were two at the time of the acts complained of. The respondents include two other Board members (Nelson and Stroble), leaving three members of the Board not parties. Any action of the Board must be taken by a majority thereof. Based thereon, the courts below found an absence of any allegation of a plausible causal nexus between this additional alleged harm and any actions by respondents.

This is particularly true as applied to Kamrowski and RoughRider. Kamrowski investigated at the request of the Marshall County Attorney. He reported to the Marshall County Attorney, and only to the Marshall County Attorney, per his instructions. The averment that Kamrowski knew that his report would be made public is a mere conclusory allegation and irrelevant anyway. Kamrowski did not report to the Board. He did not vote on the Board. He has never been a member of the Board. He did not tell the Board how to vote. He does not advise the Board. To the extent his report came to the attention of the Board, it was done by others and in connection with the county attorney's opinion that he found no basis to take any action against petitioners.

The Petition for Writ of Certiorari scarcely mentions Kamrowski and RoughRider at all. They appear therein only as "a private investigator from North Dakota [who] sought to defame [petitioners]." (Petition at 3) The Petition recites no facts tending to show a causal connection between RoughRider and the other harms that allegedly befell petitioners. There are no such other facts. The pertinent facts are that the Marshall County Attorney, at the request of the Marshall County Commissioners, asked RoughRider to investigate goings-on at the Watershed District Board. Pursuant thereto, Kamrowski investigated and reported, per his instructions, to the county attorney only. At some point, the entire Board, or a majority thereof, took the votes of which petitioners now complain, i.e., rescinding petitioners' check-signing authority and the other alleged acts. But these facts show a complete absence of any causal connection between anything that RoughRider did and the alleged injuries.

Under these circumstances, Kamrowski and RoughRider are so far removed from the alleged additional injuries that any inference of a causal connection between the report and those injuries is a matter of gross speculation, comparable to a mere metaphysical doubt. There is no plausible inference that the acts of Kamrowski and RoughRider had anything to do with the alleged additional harms. The courts below were manifestly correct in so deciding. Petitioners have alleged no sound reason to review that decision. The only specific argument petitioners

assert is that chronology should produce the requisite inference of causation. (Petition at 8) (*See also* 8th Circuit discussion at Appendix 14a). But simply asserting that chronology should produce an inference of causation does not make it so. Petitioners are simply restating the ancient logical fallacy of post hoc, ergo propter hoc. Chronology produces no valid inference of causation. Petitioners have adduced no sound reason why the rule should be otherwise in this case.

III. RES JUDICATA BARS ANY POTENTIAL FEDERAL CLAIM IN FAVOR OF PETITIONERS.

The decision of the district court dismissed all federal claims asserted by petitioners with prejudice and denied any state claims without prejudice thereby inviting petitioners to assert their state claims in state court. Petitioners did so. They sued Kamrowski and RoughRider in North Dakota state court alleging a claim of defamation in several different counts. That action ended in dismissal of all claims by the North Dakota District Court, Grand Forks County, affirmed on appeal by the North Dakota Supreme Court. *Zutz and Elseth v. Kamrowski and RoughRider*, ___N.W.2d ___, 2010 ND 155 (N.D. 2010). Accordingly, the North Dakota state action has been fully and finally resolved by judgment of dismissal in favor of Kamrowski and RoughRider. No further appeals are available under North Dakota state law. Petitioners submitted a timely request for rehearing before

the North Dakota Supreme Court on August 31, 2010, which that court has now denied.

Based on that decision of the North Dakota Supreme Court, any federal claims by petitioners are precluded by the doctrine of res judicata. Petitioners allege violation of federal rights, but the only alleged mechanism of any such violations is by defamation. They allege that the other harmful acts taken by vote of the Board as a whole were motivated by a supposed campaign of defamation against them. They plead no other potential source of the alleged injury. If no one defamed petitioners, they have no violations of federal (or state) rights to complain about. A viable claim for defamation against RoughRider is a necessary factual predicate to any recovery by petitioners.

The North Dakota Supreme Court has fully and finally determined that petitioners have no actionable claim of defamation against Kamrowski and RoughRider. Any further federal proceedings against Kamrowski and RoughRider would be in derogation of that North Dakota judgment.

The Full Faith and Credit Clause of the U.S. Constitution, Article IV, Section 1, may not require a federal court to give full faith and credit to judgments of state courts in subsequent federal litigation. However, the Full Faith and Credit Act, 28 U.S.C. § 1738, provides that state judgments shall be given the same effect in subsequent federal litigation as they would have in the state that issued them. The federal civil rights statutes, including 42 U.S.C. § 1983, do not

create any statutory exception to the Full Faith and Credit Act. *Allen v. McCurry*, 449 U.S. 90, 104 (1980). North Dakota subscribes to the doctrine of res judicata. *Fichter v. Kadrmas*, 507 N.W.2d 72, 74 (N.D. 1993).

In order to recover against Kamrowski and RoughRider in any continued federal litigation, petitioners would necessarily have to show that Kamrowski and RoughRider defamed them. The North Dakota Supreme Court has found that petitioners have no actionable claim for defamation against Kamrowski and RoughRider. That judgment is binding, is final and entitled to full faith and credit by virtue of federal statute, if not the Constitution. Accordingly, petitioners cannot proceed with further federal litigation. Any review by this Court would be moot.

CONCLUSION

For all the above reasons, respondents Kamrowski and RoughRider request that this Court deny petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD P. MAHONEY
Counsel of Record
VICTOR LUND
MAHONEY, DOUGHERTY & MAHONEY, P.A.
801 Park Avenue
Minneapolis, MN 55404
(612) 339-5863
rmahoney@mahoney-law.com

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN NELSON AND ARLYN STROBLE

LINDSAY G. ARTHUR, JR.
Counsel of Record
ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, Minnesota 55402-3214
(612) 339-3500
lgarthur@arthurchapman.com

Attorney for Respondents John Nelson And Arlyn Stroble

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether further review of Petitioners' First Amendment retaliation claim is appropriate where the Eighth Circuit correctly applied well-settled law to the allegations in the pleadings before concluding Petitioners have not alleged an actionable retaliation claim?

II. Whether further review of Petitioners' Fourteenth Amendment cause of action is appropriate when the Eighth Circuit correctly applied *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), which holds that harm to reputation, alone, cannot support a Fourteenth Amendment claim as a matter of law?

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STATEMENT

Petitioners' claims against Respondents Nelson and Stroble ("Respondents") arise out of a meeting of the Middle Snake Tamarac Rivers Watershed District Board ("Board") on June 18, 2007. The Board consists of seven members; Petitioners Elseth and Zutz ("Petitioners") and Respondents are four of the members; the remaining three members are not parties to this litigation.

Petitioners allege that Nelson made two statements at the meeting: "I don't think that there is much question that he did [violate the law]," and "[l]aws are being broken by Board Members-enough is enough." Petitioners attribute those two statements as referring to both Petitioners (despite the fact that the first reference was made in the singular). Petitioners also allege that Stroble stated "[w]hy should we provide legal counsel for actions that are against the law?" Petitioners interpret the statement as being directed at them.

Petitioners brought this federal lawsuit against Respondents, alleging defamation claims based on Section 1983. Petitioners moved for dismissal of the Complaint, arguing, *inter alia*, that the lawsuit did not plead actionable Federal claims. Prior to oral argument on this motion, Petitioners sought, and were granted, leave to bring a motion to amend their Complaint. Petitioners then issued a proposed Amended Complaint, which sought to amend the original Count I, into two new counts: Count I, a violation of their First Amendment right to exercise free speech and to petition the government; and Count II, a deprivation of property

without due process, in violation of the Fifth and Fourteenth Amendments.

To support the new claims, Petitioners alleged that the Board, and not Respondents individually, did the following: Refused to rent land to Petitioner Zutz, "censored" Petitioner Elseth and disconnected his water, barred Petitioners from serving on Watershed District committees, did not appoint Petitioners to various positions, and removed Petitioners from the Watershed District's check register.

The Magistrate denied Petitioners' motion to amend the Complaint, concluding the additional claims were futile. This order was confirmed by the District Court and, in addition, the District Court dismissed the Complaint. The Eight Circuit affirmed the District Court.

REASONS FOR DENYING REVIEW

I. Further review of the First Amendment Section 1983 retaliation claim is inappropriate because the Eighth Circuit correctly applied the facts as plead in Petitioners' Complaint to well-established and uniform federal law.

To establish a *prima facie* case of retaliation for exercise of First Amendment rights under 42 U.S.C. § 1983, Petitioners must sufficiently plead that they were (1) engaged in protected activity and (2) that defendants "took adverse action against [them] that would chill a person of ordinary firmness from engaging in that activity." *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir.

2007). Petitioners ask this Court to identify "the extent of allegations necessary" to plausibly plead "adverse action" that would support a First Amendment retaliation claim. Petitioners' inquiry is readily answered by longstanding, uniform law and is inappropriate for Supreme Court review.

"The ordinary-firmness test is well established in the case law, and is designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First Amendment." *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003). The determination of whether government conduct or speech has a chilling effect or an adverse impact is an objective one; the court determines whether a similarly situated person of ordinary firmness reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case. *Lewis*, 486 F.3d at 1028; *see also Blat. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006) (citing *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)); *ACLU v. Wicomico County*, 999 F.2d 780, 786 (4th Cir. 1993); *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) (tailoring adverse impact analysis to specific circumstances presented). Because the analysis is objective, it is resolved as a matter of law. *Ehrlich*, 437 F.3d at 416.

Petitioners do not suggest that the lower courts applied unsettled or novel law. Rather, their Petition asks this Court to review application of the allegations in the pleadings to well-settled federal law. Where the Circuit Court applied the correct law, the Supreme Court will rarely grant review "when the asserted error

consists of . . . misapplication of a properly stated rule of law." S. Court Rule 10; *see also General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-79, 58 S. Ct. 849, 82 L. Ed. 1273 (1938) ("Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

Besides not raising an issue that warrants Supreme Court Review, an analysis of the merits of the allegations leads to a conclusion that in no event do Petitioners adequately allege a viable First Amendment claim. Their Complaint alleges harm to reputation, alone, as the "adverse event" that allegedly provides the basis for a § 1983 claim under the First Amendment. However, public officials such as Petitioners "need to have thicker skin than the ordinary citizen when it comes to attacks on their views." *Mattox v. City of Forest Park*, 183 F.3d 515, 522 (6th Cir. 1999). Since "[c]riticism of public officials lies at the very core of speech protected by the First Amendment . . . . it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002) (citation omitted) (internal quotation marks omitted). The Eighth Circuit properly applied the law to the allegations in the pleading to determine that Petitioners failed to sufficiently plead a Section 1983 First Amendment claim. Therefore, there is no compelling reason for the Supreme Court to grant review.

II. Further review is inappropriate because the Eighth Circuit correctly applied the facts as plead in Petitioners' Complaint to the longstanding, well-established law as annunciated by *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), which holds that harm to reputation, alone, cannot support a Fourteenth Amendment Section 1983 claim as a matter of law.

Petitioners ask this Court to reconsider *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) and depart from almost forty years of precedent that holds harm to reputation, alone, is insufficient as a matter of law to support a Section 1983 Fourteenth Amendment claim. Petitioners rely upon three sources in support of their position: the dissent in *Davis*; *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); and *Jenkins v. McKeithen*, 395 U.S. 411 (1969). (Pet. For Writ of Cert. 9, 10.)

Petitioners' legal authority either predates *Davis* or cites the dissenting opinion in that decision. But the well-reasoned majority opinion in *Davis* explained the reasoning in *Constantineau* before stating that decision was consistent with the ultimate ruling in *Davis*. The Court also distinguished *Jenkins* at footnote four. In short, Petitioners fail to present any legal authority since 1976 which conflicts with or overrules *Davis*. Because Federal Courts, including the Eighth Circuit in this case, have consistently applied *Davis* for almost forty years, Respondents respectfully ask this Court to deny the Petition.

III. Further review of both the First and Fourteenth Amendment Claims is inappropriate because the Eighth Circuit correctly applied the facts as plead in Petitioners' proposed Amended Complaint to the well-established law before properly concluding that any amendment would be futile.

Petitioners argue that even if harm to reputation is not sufficient to establish Section 1983 First or Fourteenth Amendment claims, the lower courts should have allowed them to amend their complaint to allege other harm. Petitioners' suggestion is misplaced because the added allegations of harm involve Board conduct and not conduct attributed to Respondents individually.

It is well-settled that a Section 1983 claim requires proof that a defendant's wrongful conduct caused the constitutional deprivation. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). A complaint is properly dismissed if there is "no causal connection between the alleged deprivations and the challenged conduct." *Id.*

Here, the Eighth Circuit correctly ruled that Petitioners' attempt to amend was futile because the proposed Amended Complaint alleges that the *Board*, not the Respondents individually, caused the additional harm as alleged in the Amended Complaint. Because no causation exists, amending the Complaint would be futile. *In re 2007 Novastar Fin, Sec. Litig.*, 579 F.3d 878, 884 (8th Cir. 2009). Therefore, the Eighth Circuit correctly denied Petitioners' motion and no compelling reason exists for this Court to grant review. *See* S. Court Rule 10; *see also General Talking Pictures Corp.*, 304 U.S. at 178-79.

CONCLUSION

For the reasons set forth above, Respondents John Nelson and Arlyn Stroble respectfully ask this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

LINDSAY G. ARTHUR, JR.
Counsel of Record
ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, Minnesota 55402-3214
(612) 339-3500
lgarthur@arthurchapman.com

Attorney for Respondents John Nelson And Arlyn Stroble

(4)

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SUPPEMENTAL BRIEF

PAUL A. SORTLAND
Counsel of Record

Sortland Law Office
431 South Seventh Street
Suite 2440
Minneaplis, MN 55415
sortland@sortland.com
(612) 875-0400

CURRY & TAYLOR • 202-393-4141

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CONSTITUTIONAL PROVISIONS

MINNESOTA CONSTITUTION, ARTICLE IV, SECTION 10 2

SUPPLEMENT

On September 9, 2010, the Minnesota Supreme Court reversed the decision of the Court of Appeals in *Zutz and Elseth v. Nelson*, __ N.W.2d __ (Minn. September 9, 2010). Supp. App., 1sa. In this case, the Minnesota Supreme Court reversed the decision of the Court of Appeals. It held that Watershed District board members are not protected by a absolute privilege against defamation suits for statements made when board members are performing a legislative function on behalf of the District. Instead, the Minnesota Supreme Court held that Watershed District board members are only protected by a qualified privilege, which allows the matter to proceed for further discovery and a resolution.

The Court discussed two categories of privilege which can exist as defenses against defamation claims - absolute privilege and a condition or "qualified" privilege. *Id.*, p. 5. It noted that both types of privilege are broadly recognized across the United States, and generally "result from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory," citing *Lewis v. Equitable Life Assur. Soc.*, 389 N.W.2d 876, 889 (Minn. 1986). It held that the *Restatement (Second) of Torts* explains that absolute and qualified privileges are both "based upon a policy that treats the ends to be gained by permitting defamatory statements as outweighing the harm that may be done to the reputation of others." *Restatement (Second) of Torts*, Ch. 25, Topic 2, Title B, Introductory Note, at 242-43 (1977). Supp. App. 5sa, 6sa.

The Court recognized that absolute privilege is not lightly granted and applies only in limited circumstances. The Court held that the Minnesota Constitution grants absolute privilege from defamation liability to members of the State Senate and House of Representatives in the discharge of their official duties. The Minnesota Constitution, Article IV, Section 10. The Court has extended the absolute privilege, as a matter of public policy, to some other government officials in certain contexts, such as to government officials acting in a judicial or quasi-judicial capacity, as in *Bower v. State*, 511 N.W.2d 447, 450 (Minn. 1994), and to "top level cabinet type" officials, as in *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982). Supp. App. 7sa.

The Court noted that it had consistently declined to extend absolute privilege to all government officials, as in *Bower, supra*, and in *Jones v. Monico*, 276 Minn. 371, 375, 150 N.W.2d 213, 215-16 (Minn. 1967), declining to extend the absolute privilege to a member of a county board. The Court also noted that it had declined to extend absolute privilege from defamation liability to members of subordinate elected government bodies such as city councils and county boards, as in *Burch v. Bernard*, 107 Minn. 210, 211, 120 N.W. 33, 33 (1909). Supp. App. 7sa.

In *Jones v. Monico*, the Court reasserted its holding in *Burch* by declining to extend the absolute privilege to members of a county board accused of making defamatory statements during board proceedings. 276 Minn. 371, 375-76, 150 N.W.2d 213, 216 (1967). The Court flatly concluded that "subordinate bodies, including municipal councils or

town meetings are not within the policy underlying absolute immunity since the members of such bodies are sufficiently protected by exemption from liability in the exercise of good faith." *Id.* at 375, 150 N.W.2d at 216. Supp. App. 8sa.

The Court went on to decide the case on the much more limited issue of whether to grant absolute immunity to an unelected or even more subordinate government body-a Watershed District board. The Court held that consideration extends to closely examining the public costs and benefits of expanding the doctrine of absolute immunity from defamation liability within the confines of the case. *Zutz v. Nelson*, Minnesota Supreme Court, supra, p. 8. Supp. App. 8sa.

The Court noted that the doctrine of absolute privilege should be "confined within narrow limits." *Matthis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 417 (1954). In doing so, it concluded that limiting Watershed District board members to a qualified privilege better serves the people of Minnesota. Supp. App. 9sa.

The Court also held that extending absolute privilege to Watershed District boards would come at a cost and strike the wrong balance between competing interests of the public. *Zutz v. Nelson*, p. 12. The effect of absolute privilege is to immunize board members who engage in defamatory speech, that can be personally crushing and career ending. *Id.*, p. 14. Supp. App. 8sa, 9sa.

The Court held that there had been no expansion of the doctrine, as referenced in *Carradine v. State*, 511

N.W.2d 733 (1994). The Court held that there is a reason to draw distinction between the elected and unelected bodies. Furthermore, the reasoning underlying this argument, taken to its logical conclusion leads to absolute immunity for any and all appointed governmental boards. *Zutz, supra*, at pp. 13-14. Supp. App. 12sa.

Second, in *Carradine*, the Doctrine of Absolute Immunity was extended to defamation liability to police officers for statements made in police reports. 511 N.W.2d at 736-37. The Court recognized that the public interest is served by extending the absolute interest in some cases, but the Court did not simply announce a blanket rule that absolute privilege should extend to all government officials at all levels. *Id.*

This discussion in Zutz and Elseth is important, because the decisions of the district court, relied, in large part, on the Court of Appeals decision in *Zutz v. Nelson*, unpublished, (Minn. App. June 23, 2009), in asserting res judicata as grounds for ruling against Zutz and Elseth in this present appeal. For example, in the Order of Magistrate Judge Raymond Erickson, dated December 1, 2008, App. 22a, the court held that a prior state court judgment will have a preclusive effect. See, 33a and 33b. It noted that the state court held that Nelson and Stroble held "an absolute privilege for statements made as appointed board members of a political subdivision of the State of Minnesota, speaking on pertinent matters of the Watershed District." See, Decision, p. 34a. This is exactly what was overruled by the Minnesota Supreme Court this past month.

Again, in ruling against the plaintiffs in their motion to amend the pleadings, the Magistrate ruled, on January 12, 2009, that the proposed amendment would be futile, because the same allegations were dismissed, and Nelson and Stroble were entitled to absolute immunity. See, Decision, p. 4.

These decisions were echoed by the Eighth Circuit. In *Zutz v. Nelson*, 601 F.3d 842, 846-47 (8th Cir. 2010), where the Court noted that the Magistrate Judge denied the motion for leave to amend finding that the proposed amendments would be futile because they were barred by res judicata. Accordingly, the Magistrate Judge held that the Amended Complaint was devoid of any federal cause of action. *Id.*

Consequently, these decisions should be reversed, and the matter remanded in light of the Minnesota Supreme Court reversal.

CONCLUSION

Since the Minnesota Supreme Court reversed the prior decision of the Minnesota Court of Appeals, on September 9, 2010, this matter should be reversed. The decision of the Eighth Circuit should be vacated, and this matter remanded back to the district court for proceedings in light of the vacation of the state court judgment.

Respectfully Submitted,

PAUL A. SORTLAND
SORTLAND LAW OFFICE
431 South Seventh Street, Suite 2440
Minneapolis, Minnesota 55415
(612) 375-0400
(612) 375-0404 (Facsimile)

ATTORNEY FOR PETITIONERS

A08-1764

SUPREME COURT OF MINNESOTA

Loren J. Zutz, et al., Appellants,

vs.

John Nelson, et al., Respondents.

September 9, 2010, Filed

COUNSEL: Paul A. Sortland, Sortland Law Office, Minneapolis, Minnesota, for appellants.

Lindsay G. Arthur, Jr., Beth Jenson Prouty, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota, for respondents.

ANDERSON, G. Barry, Justice. STRAS, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case. ANDERSON, Paul H. J., (dissenting).

OPINION

ANDERSON, G. Barry, Justice.

This case involves the level of privilege from defamation liability applicable to subordinate government bodies such as watershed district boards. All four parties are board members of the Middle Snake Tamarac Rivers Watershed District in northwestern Minnesota. While serving as board members, Loren J.

Zutz and Elden J. Elseth conducted an investigation regarding alleged improprieties in the watershed district's payroll practices. Fellow board members John Nelson and Arlyn Stroble believed that the actions of Zutz and Elseth were inappropriate and in violation of the law. Both Nelson and Stroble allegedly made statements to that effect at a 2007 watershed district meeting, and Zutz and Elseth then brought this action against Nelson and Stroble for defamation. The Marshall County District Court granted Nelson and Stroble's motion for judgment on the pleadings, holding that as board members, they were protected by an absolute legislative privilege. Zutz and Elseth appealed, and the court of appeals affirmed in an unpublished decision. *Zutz v. Nelson*, No. A08-1764, 2009 Minn. LEXIS 606, 2009 WL 1752139 (Minn. App. June 23, 2009). Because we hold that members of watershed district boards are entitled to only a qualified, rather than an absolute, privilege, we reverse and remand.

A watershed district is a special-purpose unit of local government created by statute "[t]o conserve the natural resources of the state by land use planning, flood control, and other conservation projects." Minn. Stat. § 103D.201, subd. 1 (2008). Watershed districts are established for various specific purposes serving those ultimate goals, including controlling flood waters, diverting watercourses, providing and conserving water supply, regulating the use of ditches and watercourses, regulating improvements by riparian property owners, and providing hydroelectric power, among others. Minn. Stat. § 103D.201, subd. 2 (2008). Watershed districts have extensive authority at their disposal in order to accomplish these goals. For

example, districts may acquire dams, dikes, reservoirs, water supply systems, and real and personal property by exercising the power of eminent domain or by other means. Minn. Stat. § 103D.335, subds. 1(3), 9, 11 (2008).

Each watershed district in Minnesota is operated by a board of managers. The county commissioners of the counties served by the watershed district appoint the managers, who serve three-year terms. Minn. Stat. §§ 103D.311, subd. 2, 103D.315, subd. 6 (2008). Board members of watershed districts take an oath that applies to Executive Department officers, Minn. Stat. § 103D.315, subd. 1 (2008), but also act in a quasi-legislative capacity. The Middle Snake Tamarac Rivers Watershed District's board has seven members, six of whom are appointed by the Marshall County commissioners. The seventh member is appointed by the Polk County commissioners.

The Middle Snake Tamarac Rivers Watershed District is one of 45 watershed districts in Minnesota. The district is located in northwestern Minnesota, primarily in Marshall County, and covers the natural watershed areas of the Middle, Snake, and Tamarac Rivers. All three rivers are tributaries of the Red River.

Watershed district boards hire employees to facilitate "the works and improvements undertaken by the district." Minn. Stat. § 103D.325, subd. 3 (2008). In the course of their activities as members of the district's board, plaintiffs Zutz and Elseth became concerned about payments to various district employees. They made inquiries at the district's bank, and obtained certain bank records in response to their inquiries.

At a district board meeting on June 18, 2007, two other board members, defendants Nelson and Stroble, allegedly accused Zutz and Elseth of violating the Minnesota Government Data Practices Act by making inquiries and obtaining the records from the bank. Specifically, in response to a question about whether Zutz and Elseth violated the Minnesota Government Data Practices Act, Zutz and Elseth allege that Nelson stated: "I don't think there is much question that he did."[1] Nelson also allegedly said, "Laws are being broken by Board Members--enough is enough!" The implication of that statement was allegedly that Zutz and Elseth had violated Minnesota law. Zutz and Elseth also allege that at the same meeting, Stroble said, "Why should we provide legal counsel for actions that are against the law?" implying that Zutz and Elseth had engaged in unlawful activities.

Zutz and Elseth brought an action against Nelson and Stroble for defamation. Nelson and Stroble raised several affirmative defenses and moved for judgment on the pleadings. The district court granted the motion and dismissed the complaint on the ground that an absolute legislative privilege protected Nelson and Stroble from defamation claims.

Zutz and Elseth appealed, arguing that Minnesota law does not extend absolute privilege to subordinate bodies such as watershed district boards. The court of appeals affirmed the district court's judgment in an unpublished opinion. *Zutz v. Nelson*, No. A08-1764, 2009 Minn. LEXIS 606, 2009 WL 1752139, at *2 (Minn. App. June 23, 2009). We granted review on one legal issue: whether the doctrine of absolute legislative privilege applies to allegedly defamatory statements

made by members of a subordinate public body, such as the board of the Middle Snake Tamarac Rivers Watershed District.

The district court granted Nelson and Stroble's motion for judgment on the pleadings under Minnesota Rule of Civil Procedure 12.03 and dismissed Zutz and Elseth's complaint. We have said that "[j]udgment on the pleadings is proper where the defendant relies on an affirmative defense or counterclaim which does not raise material issues of fact." *Jacobson v. Rauenhorst Corp.*, 301 Minn. 202, 206, 221 N.W.2d 703, 706 (1974), *overruled on other grounds by Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.*, 281 N.W.2d 838 (Minn. 1979). On appeal from such a dismissal, we consider only the facts alleged in the complaint, accepting those facts as true and drawing all reasonable inferences in favor of the nonmoving party. *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 45 (Minn. 2009). We review de novo whether "the complaint sets forth a legally sufficient claim for relief." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

Two categories of privilege exist as defenses against defamation claims--absolute privilege and conditional or "qualified" privilege. Both types of privilege are broadly recognized across the United States, and generally "result[] from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory." *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 889 (Minn. 1986). The Restatement (Second) of Torts explains that absolute and qualified privileges are both "based upon a

policy that treats the ends to be gained by permitting defamatory statements as outweighing the harm that may be done to the reputation of others." Restatement (Second) of Torts ch. 25, topic 2, tit. B Introductory Note, at 242-43 (1977). Absolute and qualified privileges cover statements made by many categories of public officials, and have the purpose of making officials "as free as possible from fear that their actions in [their] position[s] might" subject them to lawsuits for defamation. *Id.* at 243. An absolute privilege applies without regard to the intent of the speaker, but a qualified privilege requires a determination of the speaker's mental state. We have defined the difference between the two kinds of privileges by stating that "[a]bsolute privilege means that immunity is given even for intentionally false statements, coupled with malice, while a qualified or conditional privilege grants immunity only if the privilege is not abused and defamatory statements are publicized in good faith and without malice." *Matthis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 416 (1954).

Nelson and Stroble argue that their alleged statements should be covered by absolute legislative privilege. Zutz and Elseth assert that Nelson and Stroble may claim the benefit of only a qualified privilege, and therefore may avoid liability for defamatory statements only by showing their good faith and lack of malice. *See Matthis*, 243 Minn. at 223, 67 N.W.2d at 416.

Absolute privilege is not lightly granted and applies only in limited circumstances. The Minnesota Constitution grants absolute privilege from defamation liability to members of the State Senate and House of Representatives in the discharge of their official duties.

Minn. Const. art. IV, § 10. We have extended this absolute privilege, as a matter of public policy, to some other government officials in certain contexts. *E.g.*, *Bauer v. State*, 511 N.W.2d 447, 450 (Minn. 1994) (acknowledging the extension of absolute privilege to government officials acting in judicial or quasi-judicial capacities); *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982) (extending absolute privilege to Commissioner of Public Welfare in the performance of his official duties as a "top-level cabinet-type" official). But we have consistently declined to extend absolute privilege to all government officials. *E.g.*, *Bauer*, 511 N.W.2d at 450 (declining to extend absolute privilege to mid-level state employees acting in their official capacities); Jones v. Monico, 276 Minn. 371, 375, 150 N.W.2d 213, 215-16 (Minn. 1967) (declining to extend absolute privilege to a member of a county board). While our jurisprudence on the extension of the absolute privilege has not been a model of clarity, our precedent most relevant to the present dispute points us to qualified rather than absolute privilege.

We have declined to extend absolute privilege from defamation liability to members of subordinate elected government bodies such as city councils and county boards. In *Burch v. Bernard*, we declined to extend absolute privilege to a city council member who, pursuant to business before an ongoing city council meeting, accused a nurse employed by the city of "running nothing but a damn whorehouse." 107 Minn. 210, 211, 120 N.W. 33, 33 (1909). We analyzed the issue under a qualified privilege standard, stating that for the privilege to apply a city council member must make the challenged statement "'in good faith and in the honest belief that [it is] true.'" *Id.* at 212, 120 N.W. at 34

(quoting *Quinn v. Scott*, 22 Minn. 456, 462 (1876)). In *Jones v. Monico*, we reasserted our holding in *Burch* by declining to extend the absolute privilege to members of a county board accused of making defamatory statements during board proceedings. 276 Minn. 371, 375-76, 150 N.W.2d 213, 216 (1967). We flatly concluded that "subordinate bodies, including municipal councils or town meetings, are not within the policy underlying absolute immunity since the members of such bodies are sufficiently protected by exemption from liability in the exercise of good faith." *Id.* at 375, 150 N.W.2d at 216. In other words, we held that a qualified, not absolute, privilege from defamation liability applies to subordinate bodies such as city councils or county boards.[2]

We are "extremely reluctant to overrule our precedent under principles of *stare decisis*" and "require a compelling reason" to do so. *State v. Martin*, 773 N.W.2d 89, 98 (Minn. 2009) (citation omitted) (internal quotation marks omitted). While we are mindful that *stare decisis* "does not bind [our court] to unsound principles," *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000), the reasoning underlying the holdings in *Burch* and *Jones* is not unsound, and there is no compelling reason to overturn those cases.

Given our refusal to extend an absolute privilege to elected city councils or county boards, we see no reason to extend absolute privilege to appointed watershed district boards. Thus, in keeping with our holdings in *Burch* and *Jones*, we decline to extend absolute privilege here.

But we need not here decide the issue of whether to extend an absolute privilege to city councils and county boards. We can decide this case on the much more limited issue of whether to grant absolute privilege to an unelected and even more subordinate government body--a watershed district board. That consideration extends to closely examining the public costs and benefits of expanding the doctrine of absolute immunity from defamation liability within the confines of the case before us.

"The doctrine of privileged communication rests in that of public policy." *Matthis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 417 (1954). "It is peculiarly so in the case of absolute privilege, for in the case of a communication recognized as absolutely privileged even the presence of express malice does not destroy the privilege." *Id.* at 223, 67 N.W.2d at 417. Thus, we should keep the doctrine of absolute privilege "confined within narrow limits." *Id.* at 223, 67 N.W.2d at 417. The duty before our court, therefore, is to determine whether the public is best served by allowing the unelected members of a watershed district board protection from defamation liability even when they defame with malice. We conclude that limiting watershed district board members to a qualified privilege better serves the people of Minnesota.

Proponents of extending the absolute privilege to watershed district boards, including the dissent, make essentially three arguments for the absolute privilege.[3] Proponents argue: (1) without the protection of the absolute privilege, fewer Minnesotans will volunteer for service on watershed district boards or similar civic posts; (2) without the protection of the absolute

privilege, members of watershed district boards will be reticent to share important information at board meetings for fear of being sued for defamation; and (3) there is no reason why we should grant the absolute privilege for higher ranking government officials and not for lower ranking officials such as members of watershed district boards. These arguments are unconvincing.

We address the first and second arguments together as they are related. The dissent asserts the importance of watershed district boards, and stresses that these boards have extensive authority at their disposal in order to accomplish their goal of managing watersheds. We agree that watershed districts have substantial authority, including the power of eminent domain. We disagree, however, that extensive authority leads inexorably to an extension of absolute privilege. The dissent admits that we have never extended absolute privilege in Minnesota to subordinate bodies such as watershed district boards.[4] Indeed the parties do not offer any evidence that since *Burch v. Bernard*, 107 Minn. 210, 120 N.W. 33 (1909), decided a century ago, Minnesota citizens have been unwilling to serve on city councils because council members receive only qualified as opposed to absolute privilege. Given this fact, it is not surprising that the dissent simply asserts, without proof, that absolute privilege is necessary to encourage volunteers to serve as members of *unelected* watershed district boards.

The dissent similarly asserts, without record evidence, that exposing members of watershed district boards to potential defamation claims will have a "chilling effect" that will not only result in an inability to attract

qualified board members but that will also prevent those members who do volunteer from having candid deliberations at board meetings. Neither the parties to this case nor the dissent provides any evidence of a "chilling effect" associated with service on a board with a qualified privilege. We see no compelling need to extend the absolute privilege without any evidence that the qualified privilege is insufficient to protect members of watershed district boards.[5]

Moreover, extending the absolute privilege to watershed district boards would come at a cost and strike the wrong balance between the competing interests of the public. The effect of absolute privilege is to immunize board members who engage in defamatory speech, speech that can be personally crushing and career-ending. Watershed district board members are appointed by county boards. So, unlike the State Legislature, or even a city council or county board, citizens who dislike the actions of watershed district boards cannot vote these members out of office. Nor can citizens necessarily vote out of office those who *appointed* watershed district board members.[6]

Consider the example of a hypothetical watershed district facing an eminent domain issue which prompts a heated exchange between a citizen who does not want her property seized by the government and a district board member who wrongly impugns the character of the complaining citizen. It is one thing to say that the board member has a qualified privilege in connection with official district deliberations, and quite another to say that a district board member may attack the complaining citizen with express malice. A more persuasive argument can be made, perhaps, for

extending absolute privilege to the deliberations of elected county and municipal bodies, in that the citizen damaged by the wrongful speech of the board member at least has the remedy of voting for someone else. But here, the watershed district board members are largely unaccountable to the public they serve. The dissent asserts that watershed district boards are susceptible to public scrutiny and criticism and are therefore accountable. Because there is no direct accountability to the voters for watershed district board members, we agree with the dissent that public criticism is the only vehicle for holding board members accountable. But this fact supports a qualified rather than absolute privilege, at least in the absence of proof of anything more than a theoretical problem. The damage from defamatory statements is real; public criticism of an unelected board member is hardly comparable.

Finally, the third argument proponents make for extending absolute privilege to watershed district boards is that there is no reason to draw a distinction between higher ranking legislative bodies and lower ranking bodies such as watershed district boards. The dissent supports this argument by reference to our decision in *Carradine v. State*, 511 N.W.2d 733 (Minn. 1994). We disagree for two reasons. First, there is a reason to draw a distinction between elected and unelected bodies as discussed above. Additionally, the reasoning underlying this argument, taken to its logical conclusion, leads to absolute immunity for any and all appointed governmental boards, at least to the extent those boards have significant powers, and might very well extend to administrative employees serving in countless governmental bureaucracies. In the end, we conclude that judicial extension of the absolute

privilege should occur only on the basis of sound evidence that a need exists.

Second, *Carradine* does not support the dissent's position. In *Carradine* we extended the absolute privilege from defamation liability to police officers for statements made in police reports. 511 N.W.2d at 736-37. We recognized that the public interest is served by extending the absolute privilege in some cases, but we did not simply announce a blanket rule that absolute privilege should extend to all government officials at all levels. Rather, we weighed the competing public policies relevant in that context and determined that, in the narrow case of a police officer's official report, the people of Minnesota are better served by extending the absolute privilege. Indeed, in *Bauer v. State*, a case we decided contemporaneously with *Carradine*, we decided not to extend the absolute privilege to certain mid-level government employees. 511 N.W.2d 447, 450 (Minn. 1994). We declined to extend the privilege because the specific facts and policy considerations in *Bauer* did "not raise public policy considerations of the same urgency as *Carradine*." *Id.* *Bauer* and *Carradine* both reassert the basic principle expressed in *Matthis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 417 (1954), that we only extend the absolute privilege to government officials when public policy weighs strongly in favor of such extension.

For the reasons discussed above, we conclude that the people of Minnesota are better served by the application of a qualified, rather than absolute, privilege to members of watershed district boards. We therefore reverse the district court and remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

STRAS, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

Footnotes

1The complaint states that "he" in this statement by Nelson referred to both Zutz and Elseth.

2We have also said, in dicta, citing a Massachusetts case and a now-antiquated legal treatise, that the "rule of general application in this country that libelous or slanderous matter published in the due course of . . . legislative proceedings is absolutely privileged" applies to "all legislative bodies, state or municipal." Peterson v. Steenerson, 113 Minn. 87, 89, 129 N.W. 147, 147-48 (1910). And in *Jones*, we created confusion by quoting the *Peterson* dicta. Jones, 276 Minn. at 374-75, 150 N.W.2d at 215-16. But we have not applied the *Peterson* dicta in later cases and have consistently applied qualified rather than absolute privilege to subordinate elected bodies such as city councils and county boards.

3The dissent also bases its position on a "diverse collection of authorities" that it asserts represents the "modern rule." All but one of the sources cited by the dissent, however, address the extension of the absolute privilege to duly elected city and county legislative bodies, which is not at issue in the case before us. Further, it is only the soundness of the reasoning underlying the sources that should concern us, not the perceived trend in those sources.

4For instance, as the dissent notes, Minnesota was listed among jurisdictions not extending absolute privilege to subordinate legislative bodies in the Restatement (Second) of Torts. *See* 5 Restatement (Second) of Torts app. § 590, Reporter's Note cmt. c (1981).

5The Legislature is, of course, free to extend the absolute privilege to the watershed district boards, which are a legislative creation. As a matter of public policy it is preferable that the Legislature determine whether an absolute privilege is needed to ensure the service of willing and qualified volunteers on these boards. To date, the Legislature has declined to extend absolute privilege to watershed district boards.

6The Middle Snake Tamarac Rivers Watershed District, at issue in this case, has six members appointed by the Marshall County Board of Commissioners and one member appointed by the Polk County Board of Commissioners. If a resident of Polk County living within the Middle Snake Tamarac Rivers Watershed District took issue with the actions of members of the watershed district board appointed by Marshall County, that resident would not be able to vote against those who appointed the offending watershed district board members.

ANDERSON, Paul H. J., (dissenting).

I respectfully dissent. The majority relies on two of our older cases--one from 1909 and the other from 1967--in declining to extend absolute legislative privilege to statements made by watershed district board members in their official capacities. *Jones v. Monico*, 276 Minn.

371, 150 N.W.2d 213 (1967); *Burch v. Bernard*, 107 Minn. 210, 120 N.W. 33 (1909). Since we decided those cases, a contrary trend has emerged in several other jurisdictions, extending absolute privilege beyond a state's highest legislative bodies. I find the authority supporting the modern trend highly persuasive. A thorough review of cases from our court and elsewhere, including the United States Supreme Court supports a change in the law in this area. Because I conclude that the qualified privilege provides insufficient protection for the public interest in free and open legislative debate, I dissent.

The extension of the absolute legislative privilege, which Minnesota's Constitution grants to members of the Legislature, to other contexts as a matter of policy has been "'a story of uneven development.'" *Carradine v. State*, 511 N.W.2d 733, 734 (Minn. 1994) (quoting *Barr v. Matteo*, 360 U.S. 564, 579, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959) (Warren, C.J., dissenting)). In an early case, we stated that "It is a rule of general application in this country that libelous or slanderous matter published in the due course of judicial or legislative proceedings is absolutely privileged . . . . The rule is broad and comprehensive, including within its scope . . . all legislative bodies, state or municipal." *Peterson v. Steenerson*, 113 Minn. 87, 89, 129 N.W. 147, 147-48 (1910) (citations omitted). This broad language in *Peterson* was dicta, however, because a member of a state or municipal legislative body did not make the statement at issue. Rather, in *Peterson* we addressed statements made by a postmaster regarding the misconduct of a mail carrier and held that only qualified privilege, and not absolute privilege, applied. *Id.* at 88, 90, 129 N.W. at 147, 148.

Our broad statement in *Peterson* regarding the scope of absolute legislative privilege was to a certain degree inconsistent with three of our earlier cases on this issue. In those earlier cases, we focused on the scope of the duties of the members of local legislative bodies, and held that their allegedly defamatory statements were not absolutely privileged because the statements exceeded the scope of those duties. In *Wilcox v. Moore*, 69 Minn. 49, 50-51, 71 N.W. 917, 918 (1897), for example, a city council published a resolution in the local newspapers calling for the resignation of a local judge and describing the judge's alleged conduct as "highly unbecoming a man." The judge sued the city council, and we held on appeal that "the article [was] not privileged" because the city council members "went outside of the line of their official duty" in publishing it. *Id.* at 52, 71 N.W. at 919. In *Trebby v. Transcript Publishing Co.*, 74 Minn. 84, 88-89, 76 N.W. 961, 961-62 (1898), we similarly held that a city council resolution published in the local newspaper that characterized the plaintiff as a "disreputable person" was not "within the scope of official authority" and therefore was not absolutely privileged. Finally in *Burch*, 107 Minn. at 211-12, 120 N.W. at 33-34, where a city council member accused a nurse employed by the city of "running nothing but a damn whorehouse," we held that the statement was not absolutely privileged because it was not "made on a proper occasion" nor "pertinent to any inquiry or investigation pending before the council."

More than half a century later in *Jones*, 276 Minn. 371, 150 N.W.2d 213 (1967), we again addressed the issue of absolute legislative privilege for members of subordinate legislative bodies. The plaintiff in *Jones* charged members of a board of county commissioners

with defamation of his personal and business reputation during board proceedings. *Id.* at 371-72, 150 N.W.2d at 214. Citing the language in *Peterson* applying absolute privilege broadly, we said that

> [s]tatements made in the course of legislative proceedings, including those made by members of municipal councils or other governing bodies of political subdivisions, are privileged. This privilege applies if it relates to a matter within the scope of that particular body's authority.

Jones, 276 Minn. at 374, 150 N.W.2d at 215 (citing *Peterson*, 113 Minn. at 89, 129 N.W. at 147).

With no explanation of our reasoning, we abruptly shifted gears in *Jones* after making the foregoing broad statement about the general rule on absolute privilege and proceeded to articulate a much narrower holding. We held that "the proceedings of subordinate bodies, including municipal councils or town meetings, are not within the policy underlying absolute immunity since the members of such bodies are sufficiently protected" by the qualified or conditional privilege. *Id.* at 375, 150 N.W.2d at 216. In reaching this holding, we did not elaborate further regarding the policy underlying absolute privilege or the reasons for distinguishing subordinate legislative bodies from the State Legislature. The court of appeals has subsequently read *Jones* as placing Minnesota "among the jurisdictions applying [only a] conditional privilege" to subordinate legislative bodies. *Johnson v. Northside Residents Redevelopment Council*, 467 N.W.2d 826, 828 (Minn. App. 1991), *rev. denied* (Minn. July 24, 1991).

In their analysis of the case before us, neither the district court nor the court of appeals cited *Jones* or discussed its reasons for reaching a result contrary to our holding in *Jones*. Both courts focused on our more recent cases dealing with absolute privilege in the executive branch. *See, e.g., Johnson v. Dirkswager*, 315 N.W.2d 215, 216 (1982) (extending absolute privilege to cover a top level cabinet-type official in the executive branch). In *Carradine v. State*, 511 N.W.2d 733, 736-37 (Minn. 1994), the case upon which the court of appeals relied most heavily, we held that police officers enjoy absolute privilege against defamation suits arising from the contents of their official arrest reports, but only a qualified privilege with respect to statements made to the news media. Adopting reasoning from the United States Supreme Court, we noted in *Carradine* that immunity:

> is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

Id. at 735 (quoting *Barr v. Matteo*, 360 U.S. 564, 572-73, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959)). Rejecting the high level/low level officer distinction, we went on to state in *Carradine* that the assignment of an absolute privilege to an executive official "depends on many factors, including the nature of the function assigned to

the officer and the relationship of the statements to the performance of that function." *Carradine*, 511 N.W.2d at 736.

The court of appeals read *Carradine* as implicitly overruling *Jones*, although the court of appeals reached this result without citing or discussing *Jones* itself. *Zutz v. Nelson*, No. A08-1764, 2009 Minn. LEXIS 606, 2009 WL 1752139, at *1 (Minn. App. June 23, 2009). Rather, the court of appeals discussed *Johnson v. Northside Residents Redevelopment Council*, 467 N.W.2d 826, 828 (Minn. App. 1991) *rev. denied* (Minn. July 24, 1991), a case that followed the bright-line rule we articulated in *Jones*. The court stated that:

> Although the *Johnson* court indicated that proceedings of municipal councils and other subordinate bodies are not within the policy underlying absolute immunity, the Minnesota Supreme Court has since held [in *Carradine*] that absolute immunity is not determined by the individual's "rank in the executive hierarchy," but rather is dependent on the "nature of the function assigned to the officer and the relationship of the statements to the performance of that function."

Zutz, 2009 Minn. LEXIS 606, 2009 WL 1752139, at *1 (citation omitted) (quoting *Carradine*, 511 N.W.2d at 735-36) (internal citation omitted). We therefore now face the decision of whether to explicitly extend *Carradine*'s reasoning to lower level officials in the legislative context, overruling *Jones* in the process, or to instead reaffirm the rule articulated in *Jones*, and hold that members of subordinate legislative bodies are

entitled to only a qualified privilege. The majority chooses the latter course, and in my view, strikes the wrong balance between the interest of the public in open legislative debate and the interests of private citizens seeking recourse for defamation.

Although we are not bound by Restatement positions, we nonetheless view them as useful persuasive authority that can sometimes prove helpful in our analysis. *See, e.g., Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 332 (Minn. 2000) (describing section 611 of Restatement (Second) of Torts as "persuasive"). Here, I find the relevant Restatement provisions to be a useful starting point for my analysis. The first Restatement of Torts grants absolute privilege to members of only "the highest legislative body of a State." Restatement of Torts § 590 cmt. c (1938). That rule reflects the majority rule of its era, but today represents a minority position.[1] The second Restatement extends the privilege by providing that "[a] member of the Congress of the United States or of a State *or local* legislative body is absolutely privileged to publish defamatory matter concerning another in the performance of his legislative functions." Restatement (Second) of Torts § 590 (1977) (emphasis added).

Our prior cases together with subsequent developments in the law, including the second Restatement, place us at a fork in the road with respect to the question of what Minnesota's law regarding absolute legislative privilege should be. We must decide whether to retain the historic rule reflected in *Jones* 276 Minn. at 375 150 N.W.2d at 216, and the first Restatement, or to abandon that rule and join other states that have adopted the modern majority position

of the second Restatement. Upon reviewing the two alternatives and the cases analyzing them, I ultimately conclude that the modern rule, applying the absolute legislative privilege more broadly, is the better rule. I will proceed to review and compare the relevant cases that lead me to this result.

The Iowa Supreme Court's 1954 case *Mills v. Denny*, 245 Iowa 584, 63 N.W.2d 222 (Iowa 1954), provides the only thorough articulation I have found of the reasoning supporting the traditional rule. In *Mills*, a mayor allegedly defamed the plaintiff, a local attorney, during a city council meeting. *Id.* at 223-24. The Iowa court explained its decision that "the utterances or publications of members of a city council are not included" in the absolute[] privilege *id.* at 227, by stating:

> Absolute immunity, it seems, should be confined to cases where there is supervision and control by other authorities, such as courts of justice, where . . . a learned judge . . . may reprimand, fine and punish as well as expunge from records statements of those who exceed proper bounds . . . . The same is true in federal and state legislatures, and their committees, where the decorum is under the watchful eye of presiding officers and records may be stricken and the offending member punished.

Id. at 225; *see also Hawkins v. Harris*, 141 N.J. 207, 661 A.2d 284, 291 (N.J. 1995) (employing the same type of analysis).

The Iowa court went on to predict that without such

"supervision and control," courts might eventually cease to "recognize and grant absolute immunity" even within courts and the highest legislative bodies of a state, because "the evil [of unredressable defamation might] overshadow the good and [thus] not aid the public welfare." *Mills*, 63 N.W.2d at 225. In addition, the court expressed a view that "only top officers or executives whose acts are of necessity secret or confidential fall within [absolute] immunity." *Id. But see Carradine*, 511 N.W.2d at 736 (extending absolute privilege to lower level executive officers under some circumstances in Minnesota).

The Iowa court in *Mills* also relied on the first Restatement of Torts and other secondary authorities of its era that granted absolute privilege to only "'the highest legislative body of a State.'" 63 N.W.2d at 226 (quoting Restatement of Torts § 590 cmt. c (1938)). The court thus followed what was at the time the holding of "the majority of the courts in other jurisdictions." *Id.* at 227. A decade later in a case involving defamation of one city council member by another, Delaware's Superior Court followed the rule of *Mills* and the first Restatement even while acknowledging "persuasive public policy reasons for making absolutely privileged" the statements of municipal legislators. *McClendon v. Coverdale*, 57 Del. 568, 203 A.2d 815, 817, 7 Storey 568 (Del. Super. Ct. 1964).

The Iowa Supreme Court's reasoning, limiting absolute privilege to the courts and the highest legislative bodies of a state where the "controlling influence of [the] learned judge" and general prevailing "decorum" might protect plaintiffs' reputation interests, has not prevailed in the modern era. *Mills*, 63 N.W.2d at 225.

Commentators criticize reasoning analogous to that in *Mills* because of the unlikelihood that defamatory statements in courts or Congress are in fact stricken from the record or controlled via censure. *E.g.*, 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 8.2 (3d ed. 2009). Several more recent cases from other states contain persuasive explanations of why absolute privilege should be extended to members of legislative bodies beyond a state's highest bodies. These cases grapple with the core policy dilemma underlying absolute legislative privilege--the appropriate balance between the public interest in free exchange of information during the legislative process and the individual rights of people who might be defamed by unscrupulous participants in that process. A growing number of courts have ultimately come out in favor of affording absolute privilege to members of local legislative bodies.[2]

In *Noble v. Ternyik*, 273 Ore. 39, 539 P.2d 658, 659-61 (Or. 1975), for example, the Oregon Supreme Court addressed a lawsuit against a port commission[3] member who allegedly falsely accused the plaintiff of theft during a commission meeting. The Oregon court discussed the shift in the Restatement rule and "reached the conclusion . . . that [the modern rule was] preferable." *Id.* at 661. The court noted that "[u]ncompensated citizens, serving at least in part to fulfill their civic responsibility, comprise the vast bulk" of members of "[p]ort commissions, city councils, school boards, and special service districts. . . ." *Id.* The court reasoned that "[t]his system will function only if capable people are willing to serve on these bodies," and many individuals would be deterred from service entirely or be "hesitant to bring information to the attention of

their legislative bodies" if they were protected by only a conditional privilege. *Id.*

The Oregon court in *Noble*, like many other courts addressing absolute privilege, found support in an argument advanced more than sixty years ago by Judge Learned Hand of the Second Circuit Court of Appeals. Judge Hand wrote that the absolute privilege is justified because

> it is impossible to know whether the [defamation] claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Id. at 661 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) *quoted in* Noble, 539 P.2d at 661.).[4]

In 1993, the Arizona Supreme Court addressed a defamation suit by two police officers against a town council member for statements made during a council meeting. *Sanchez v. Coxon*, 175 Ariz. 93, 854 P.2d 126, 127 (Ariz. 1993). The Arizona court also adopted the second Restatement of Torts rule, employing the reasoning articulated in *Noble* and citing the need to "attract[] qualified council members, promote "candor" in the local legislative process, and avoid "the chilling effect accompanying a qualified privilege." *Id.* at 129. The court reasoned that local lawmakers sometimes "legislate on matters of more immediate importance to their electorate than state or federal legislators." *Id.* at

130. Absolute immunity was therefore extended to statements "made by a town council member at a formal council meeting during the course of that meeting." *Id.*

The council member statements at issue in *Sanchez* involved criticism of local police officers in the performance of their duties. *Id.* at 127. The plaintiffs in *Sanchez* argued that absolute legislative privilege should not apply, because "the content of the statements (complaints about police officers' official conduct) was executive or administrative, rather than legislative" in nature. *Id.* at 130. A similar argument could apply to the statements at issue in this case, which involved the conduct of watershed district board members with respect to salaries and other internal administrative affairs. The Arizona Supreme Court in *Sanchez* rejected a distinction based on the content of the legislator's statements. *Id.* The court explained that "[i]t is the occasion of the speech, not the content, that provides the privilege." *Id.* This reasoning is also reflected in the Restatement (Second) of Torts § 590 cmt. a, which provides that

> legislative officers . . . are absolutely privileged in publishing defamatory matter while they are performing a legislative function although the defamatory matter has no relation to a legitimate object of legislative concern.

The Arizona court explained that "[a]ny other rule would frustrate the purposes for which immunity is granted"--that is, the policy decision to protect legislators from defending lawsuits arising out of the performance of their duties. *Sanchez*, 854 P.2d at 130.

More recently, the New Hampshire Supreme Court adopted the same reasoning in *Voelbel v. Town of Bridgewater*, 144 N.H. 599, 747 A.2d 252 (N.H. 1999). The New Hampshire court held that a town selectman was entitled to absolute privilege for comments "made at the town meeting, involv[ing] issues arising from [his] duties, related to a matter of local importance, and involv[ing] a matter properly before the town meeting" even though the specific topic was not "listed as a subject" on the agenda. *Id.* at 253.

Cases from the United States Supreme Court on related topics provide further support for my position that absolute legislative privilege should be extended to members of local legislative bodies. In a 1951 case against members of a California legislative committee, the Court addressed "[t]he privilege of legislators to be free from . . . civil process for what they do or say in legislative proceedings." *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S. Ct. 783, 95 L. Ed. 1019 (1951). The Court explained the political principles that underlie the absolute legislative privilege using the words of founder and legal theoretician James Wilson, an influential member of the Committee on Detail, which was responsible for placing the Speech and Debate Clause in the Federal Constitution. Wilson said that

> [i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and . . . be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

II *Works of James Wilson* 38 (Andrews ed. 1896) *quoted in Tenney*, 341 U.S. at 373. The Court went on to explain why a qualified privilege would be insufficient, stating that the legislative privilege protects

> uninhibited discharge of . . . legislative duty, not for . . . private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377.

In a later case quoting the foregoing language from *Tenney*, the Court made clear that "[t]his reasoning is equally applicable to federal, state, and regional legislators." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979). The Court accordingly granted immunity from federal damages liability to the members of the Lake Tahoe Regional Planning Agency, an unelected body created by California and Nevada "to adopt and to enforce a regional plan for land use, transportation, conservation, recreation, and public services." *Id.* at 394.

Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998), provides additional and informative policy discussion regarding the rank of legislative officials as it relates to immunity. In *Bogan*, the

plaintiff brought a 42 U.S.C. § 1983 action against a mayor and city council members, alleging that the elimination of the city department that employed him violated his constitutional rights. 523 U.S. at 47. The Supreme Court held that local legislators, like legislators at higher levels, are "absolutely immune from suit under § 1983 for their legislative activities," *id.* at 49, because "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability," *id.* at 52. The Court went on to reason that local "part-time citizen legislator[s]" especially merit the protection of immunity because "the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability." *Id.* at 52.

Finally, I find the analysis in *Barr v. Matteo*, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959)--reasoning that we adopted in *Carradine*--especially relevant. In *Barr*, the Supreme Court extended absolute privilege to statements made by the director of an executive government agency. *Id.* at 574. The Court rejected a bright-line rule awarding the privilege to executive officers solely based on rank. *Barr*, 360 U.S. at 572-73, *cited in Carradine v. State*, 511 N.W.2d 733, 735 (Minn. 1994). In *Barr*, the Court explained that "the duties with which the particular officer . . . is entrusted" and "the relation of the act complained of to matters committed by law to his control or supervision" guide the scope of the absolute privilege, rather than "the title of [the] office." *Barr*, 360 U.S. at 573 (citation omitted) (internal quotation marks omitted).

The diverse collection of authorities discussed above underlies my disagreement with the majority. I have carefully considered the position of the first Restatement of Torts, which granted absolute privilege to only a state's highest legislative bodies, and the second Restatement of Torts, which broadened the application of absolute legislative privilege to cover local legislative bodies as well. Our cases on absolute legislative privilege create a somewhat unclear picture of our stance on this issue to date. We adopted the bright-line rule of the first Restatement in *Jones v. Monico*, 276 Minn. 371, 375, 150 N.W.2d 213, 216 (1967), but we have also stated, at least in dicta, that absolute privilege extends to "all legislative bodies, state or municipal." *Peterson v. Steenerson*, 113 Minn. 87, 89, 129 N.W. 147, 148 (1910). And in recent decades, the majority of courts to consider this issue have adopted the modern rule embraced in the second Restatement.

Having reviewed the reasoning that underlies both the traditional rule and the modern rule, I find myself compelled to conclude that a change in Minnesota's law regarding absolute legislative privilege should be made in this case. The majority asserts that the reasoning underlying the holdings in *Burch* and *Jones* is not sound," and therefore leaves the *Jones* rule intact. I agree with the majority that stare decisis is a very important value, but I believe the public interest at stake in this case is more than sufficient to support a change in the law.

In *Burch* and *Jones*, we provided no substantive analysis to explain our choice to use only the qualified privilege. In *Jones*, 276 Minn. at 375, 150 N.W.2d at 216, we simply said that the qualified privilege provides

"sufficient protection" for members of subordinate legislative bodies without explaining why that is so. We did no more than follow what was at the time the majority rule without considering the alternatives. *Id.* at 375, 150 N.W.2d at 216. And in *Burch*, we provided no explanation at all of our reasons for applying only a qualified privilege. *See Burch v. Bernard*, 107 Minn. 210, 211-12, 120 N.W. 33, 33-34 (1909).

I therefore take issue with the majority's suggestion that I have ignored sound reasons underlying the traditional rule. I have searched carefully for such reasons in our cases and found them to be few and lacking in merit. Moreover, cases from other states following the traditional rule provide little assistance in articulating support for that rule. *Mills v. Denny*, 245 Iowa 584, 63 N.W.2d 222 (Iowa 1954), is the only case that engages in any substantive analysis in support of the rule, and I find the reasoning in *Mills* unpersuasive. The Iowa Supreme Court distinguished the state's highest legislative bodies from subordinate bodies on the basis that the highest bodies provide additional "supervision and control by other authorities" and greater standards of "decorum." *Id.* at 225. I agree with experts on the subject who conclude that these arguments are dubious at best. *See* Sack, *supra*, § 8.2 (criticizing this reasoning for the traditional rule); Restatement (Second) of Torts § 590 (1977) (adopting the modern rule).

The reasoning supporting adoption of the modern rule is persuasive and voluminous by comparison. Broader application of absolute legislative privilege encourages participation in public service by capable citizens at the local level, where much important legislative decision

making occurs. Local public servants often receive little or no compensation for their efforts, and without absolute privilege, "prestige and pecuniary rewards may pale in comparison to the threat of civil liability." *Bogan v. Scott-Harris*, 523 U.S. 44, 52, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998). Exposure to defamation suits might therefore discourage "all but the most resolute, or the most irresponsible," from taking on the burden of public service. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

Even more significantly, adoption of the modern rule would provide necessary protection for the public's interest in free and open legislative debate. *See, e.g., Sanchez v. Coxon*, 175 Ariz. 93, 854 P.2d 126, 129-30 (Ariz. 1993) (adopting the modern rule in part to promote "candor" in the legislative process). The public would be better served if legislative decision makers at all levels of government feel free to present relevant information in the discharge of their duties, without fearing "the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S. Ct. 783, 95 L. Ed. 1019 (1951). Like Judge Hand, I believe that the threat of defending oneself in a lengthy and expensive lawsuit chills legislative speech nearly as much as the threat of ultimate liability. *See Gregoire v. Biddle*, 177 F.2d at 581.

The majority asserts that my key reasons for favoring the modern rule--diminishing disincentives to public service in local government and encouraging free and open legislative speech by members of local legislative bodies--are not supported by record evidence showing any ill effects of the current rule. But such criticism

applies equally to the majority, given that the record also contains no evidence for the premise underlying the majority's preferred conclusion. We have no evidence that any defamatory speech by any member of a Minnesota legislative body has ever had "personally crushing and career-ending" effects for a citizen. I take a more optimistic view of our state's public servants and believe that the vast majority are hardworking and honest in their service of the public.

I acknowledge that empirical studies would be valuable in a case like this where we must weigh competing public policy interests in an attempt to identify the best rule of law, but we have never *required* such evidence before making a decision. Here, I am aware of no relevant studies in existence. In balancing the interests at stake--open legislative debate versus the risk of unredressable harm from defamation--I would rely on the overwhelming and well-reasoned federal and state precedent that supports adoption of the modern rule, especially our own highly relevant precedent in *Carradine v. State*, 511 N.W.2d 733, 735 (Minn. 1994).

For all of the foregoing reasons, I conclude that the qualified privilege provides insufficient protection for members of local legislative bodies. Therefore, to the extent that *Jones v. Monico*, 276 Minn. 371, 150 N.W.2d 213 (1967) applies to the facts and circumstances of this case, I would overrule that case. Extensive authority from other jurisdictions on the topic and the trend of our own cases support that result. We have already recognized the importance of the absolute privilege for lower-level officials in the executive context in *Carradine*, 511 N.W.2d at 735, and I see no reason why a distinction based solely on the rank of the official

should carry more weight in the legislative context than in the executive. I believe the court of appeals was correct in reading *Carradine* as a shift in our jurisprudence away from the *Jones* bright-line rule, a shift made in order to "'aid in the effective functioning of government'" at the local level. *Carradine*, 511 N.W.2d at 735 (quoting *Barr*, 360 U.S. at 573). I would make that shift explicit and hold that members of local legislative bodies are protected by the absolute legislative privilege against defamation suits for statements made in the performance of a legislative function.

Carradine requires that we consider "the nature of the function assigned to the officer and the relationship of the statements to the performance of that function." 511 N.W.2d at 736. Minnesota's watershed districts are significant public bodies with considerable authority to carry out important legislative functions. *See, e.g.*, Minn. Stat. § 103D.335 (2008). The public interest demands that watershed district board members carrying out their official duties, like state legislators and like police officers making official reports, have the freedom to report information in carrying out those functions without fear of facing lawsuits for defamation. I therefore conclude that the board members of the Middle Snake Tamarac Rivers Watershed District are entitled to the protection of the absolute privilege.[5] Because Nelson and Stroble made their allegedly defamatory statements during an official watershed district board meeting, I would hold that their alleged statements are absolutely privileged and that the district court therefore properly granted their motion for judgment on the pleadings.

Footnotes

1Counting jurisdictions to determine which rule is the majority and which is the minority is difficult because many states, like Minnesota, have inconsistent authority on the question. According to M.O. Regensteiner, Annotation, *Libel and Slander: Statements or Utterances by Member of Municipal Council, or of Governing Body of Other Political Subdivision, in Course of Official Proceedings, as Privileged*, 40 A.L.R.2d 941, 943 (1955), *Mills v. Denny*, 245 Iowa 584, 63 N.W.2d 222 (Iowa 1954), is the only decision that "expressly" holds that members of subordinate legislative bodies are entitled to only a conditional privilege. Several other states, however, also have authority expressing this position. *See* 5 Restatement (Second) of Torts app. § 590 Reporter's Note, cmt. c (1981) (listing cases from states including Delaware, Maine, and Minnesota).

The American Law Reports article states, and the cases cited in the note to the Second Restatement confirm that, in the majority of the comparatively few cases to consider the issue, courts "have held or recognized that at least under some circumstances members of governing bodies of political subdivisions are entitled to the complete defense afforded by [absolute] privilege, for utterances made by them during the course of official proceedings." Regensteiner at 943. Jurisdictions that have expressly adopted the modern rule include Oregon, Arizona, Michigan, New Hampshire, Florida, and (by statute) Kentucky and Utah. *See* Restatement (Second) of Torts app. § 590 Reporter's Note, cmt. c. (1981--also citing supplement(s).

2*E.g.*, *Sanchez v. Coxon*, 175 Ariz. 93, 854 P.2d 126, 130 (Ariz. 1993); *Voelbel v. Town of Bridgewater*, 144 N.H. 599, 747 A.2d 252, 253 (N.H. 1999); *Bd. of Educ. v. Buffalo Council*, 52 A.D.2d 220, 383 N.Y.S.2d 732, (N.Y. App. Div. 1976); *Costanzo v. Gaul*, 62 Ohio St. 2d 106, 403 N.E.2d 979, (Ohio 1980); *Noble v. Ternyik*, 273 Ore. 39, 539 P.2d 658, (Or. 1975).

3An Oregon port commission, like a Minnesota watershed district, is a public body created by statute for the purpose of managing water resources. *Noble*, 539 P.2d at 660; Or. Rev. Stat. § 777.010. Port commissions "exercise a great variety of governmental power, including the levying of taxes and the acquiring of property." *Noble*, 539 P.2d at 660. Port commission board members are elected. Or. Rev. Stat. § 777.135; 777.160.

4*Gregoire* was an executive privilege case, but its reasoning has been adopted in the context of legislative privilege. *See, e.g.*, *Voelbel*, 747 A.2d at 253.

5The majority relies heavily on the fact that watershed district board members are appointed by elected officials, rather than elected directly. Such officials are therefore arguably less accountable to the public. I agree that this is a relevant consideration in assessing the balance between the competing interests in this case. Ultimately though, this factor does not change my conclusion. Members of the public have a powerful interest in free and open debate during proceedings of local legislative bodies, and I do not think that interest is less in the case of a watershed district than a city council or other elected body. *Cf. Lake Country Estates, Inc., v. Tahoe Reg'l Planning Agency*, 440 U.S.

391, 405, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979) (granting immunity from federal damages liability to members of an unelected regional resource management agency with functions analogous to those of a watershed district). I see no effect of election versus appointment on this side of the balance.

Regarding an individual's interest in a remedy for defamation, I note that appointed board members are subject to public criticism and are accountable to the public through the elected officials who appointed them. Although this accountability is indirect, I do not believe that unelected members of our state's vitally important local legislative bodies are significantly more likely to maliciously defame members of the public they serve than directly elected ones. I therefore conclude that absolute privilege is equally important for all local legislative bodies, elected and appointed alike, and would hold that the absolute legislative privilege applies to both.